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IN THE

Supreme Court of the United States

October Term, 1978

No. 78-1468

FIRST NATIONAL BANK OF PEORIA,
Petitioner,

v.

GAREY R. CHILDS, et al.,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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March 23, 1979

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GAREY R. CHILDS, on behalf of himself and all others similarly situated, *Respondent.*

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

First National Bank of Peoria ("Bank"), Petitioner, requests that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Seventh Circuit, entered August 16, 1978, rehearing denied, October 24, 1978, reversing the judgment of the United States District Court for the Southern District of Illinois, entered on September 6, 1977.

I. OPINIONS OF THE COURTS BELOW

The opinion of the United States Court of Appeals for the Seventh Circuit to which this petition is addressed is reported at 583 F.2d 918 and also appears at page A-2 of the Appendix to this Petition. That opinion deals with 19 consolidated actions on appeal from district court. The issues involved in this Petition are covered in Parts III

and VII of the Court of Appeals' opinion appearing at pages A-11 and A-24, respectively, of the Appendix. The Court of Appeals' order denying Bank's petition for a rehearing is not reported but appears at page A-28 of the Appendix.

The order of the United States District Court for the Southern District of Illinois dismissing Plaintiff-Respondent's complaint was entered from the bench in open court and was, therefore, unreported. A copy of the abstract of record noting the docket entry ordering dismissal of the complaint appears at page A-29 of the Appendix.

II. JURISDICTIONAL STATEMENT

The order of the Court of Appeals denying rehearing was entered on October 24, 1978. On January 9, 1979, the Honorable John Paul Stevens, Circuit Justice, Seventh Circuit, entered an Order Extending Time to File Petition for Writ of Certiorari to and including March 23, 1979.

This Court has jurisdiction to hear the petition under 28 U.S.C. §1254(1), and the petition has been filed in the time required by 28 U.S.C. §2101(c).

III. QUESTIONS PRESENTED FOR REVIEW

1. Whether a confession of judgment obtained by a creditor pursuant to Illinois law in a contract involving an extension of consumer credit constitutes a "security interest" for the purposes of the Truth in Lending Act and Regulation Z promulgated by the Board of Governors of the Federal Reserve System ("Board") to implement that Act.
2. Whether the entry and execution of a judgment by confession pursuant to Illinois law creates a lien on consumer goods acquired by the debtor more than 10 days after execution of the confession of judgment

by the debtor and more than 10 days after the creditor gives value.

3. Whether a creditor which obtains a confession of judgment from a debtor in accordance with Illinois law and which also acquires a security interest under the Illinois Uniform Commercial Code is required by the Truth in Lending Act and Regulation Z to disclose that the security interest in after-acquired consumer goods is limited to such goods acquired by the debtor within 10 days after the secured party gives value.
4. Whether civil liability may be imposed on a creditor which discloses a security interest in after-acquired property in good faith conformity with Regulation Z and with a model disclosure form contained in a pamphlet published by the Board which contains the imprimatur "Material in this pamphlet has been prepared by the Board of Governors of the Federal Reserve System."

IV. STATUTES AND REGULATIONS INVOLVED

The Truth in Lending Act, 15 U.S.C. §§1601, *et seq.*, and Regulation Z, 12 C.F.R. Part 226, promulgated by the Board pursuant to that Act are the principal federal statute and regulation involved. The specific sections of the Act involved are §105 (15 U.S.C. §1604), §129(a) (15 U.S.C. §1639(a)), and §§130(a), (e), and (f) (15 U.S.C. §§1640(a), (e), and (f)). The pertinent provisions of the Act appear at page A-30 of the Appendix.

The specific sections of Regulation Z involved are §226.2(gg) (12 C.F.R. §226.2(gg)), §§226.8(b) and (d) (12 C.F.R. §§226.8(b) and (d)), and Interpretation §226.202 (12 C.F.R. §226.202). The pertinent provisions of Regulation Z appear at page A-33 of the Appendix.

The statutes of the State of Illinois which are principally involved are Ill. Rev. Stat. ch. 26, §9-204(2),

ch. 77, §§9 and 10, and ch. 110, §50(3), and they appear at page A-38 of the Appendix.

V. STATEMENT OF THE CASE

Respondent brought this action in the United States District Court for the Southern District of Illinois alleging that Petitioner, Bank, a financial institution organized under the laws of the United States with its only banking premises located in the State of Illinois, had violated the Truth in Lending Act and Regulation Z. Original jurisdiction in the United States District Court was conferred by 15 U.S.C. §1640(e).[1]

The consumer credit transaction upon which suit was brought by Respondent was consummated in Illinois. It was an instalment loan granted to Respondent by Petitioner on January 19, 1977, in which the amount financed was $4,447.93 and the finance charge was $777.71. Inasmuch as that transaction involved an extension of consumer credit other than open end, Petitioner furnished to Respondent the disclosures required by 15 U.S.C. §1639(a)[2] and 12 C.F.R. §§226.8(b) and (d),[3] including, *inter alia*, the disclosure required under 12 C.F.R. §226.8(b)(5) that after-acquired property will be subject to the security interest. The required disclosures were made on one side of the Note and Security Agreement evidencing the obligation above the place for the customer's signature, and a copy thereof was furnished to Respondent in connection with the transaction. A copy of said Note and Security Agreement appears at page A-45 of the Appendix.

The federal Truth in Lending Act and Regulation Z

[1] Appendix, p. A-32.

[2] Appendix, p. A-30.

[3] Appendix, p. A-33.

require disclosure of a "description" of "any security interest"[4] retained or acquired in connection with a consumer credit transaction, and Regulation Z[5] defines what constitutes a "security interest" for this purpose. However, the "description" (*i.e.*, the scope) of any such security interest is necessarily determined by the state law under which it is retained or acquired. Thus, the case at bar involves a determination of whether any such "security interest" had been retained or acquired under the federal definition of that term and, if so, the adequacy of the description of such interest or interests provided under state law.

As the Note and Security Agreement will show, Petitioner obtained a confession of judgment pursuant to the Illinois Civil Practice Act (Ill. Rev. Stat. ch. 110, §50(3)[6]) and also retained a security interest in a 1977 GMC pickup truck under the Illinois Uniform Commercial Code ("UCC") (Ill. Rev. Stat. ch. 26, §§1-101, *et seq.*[7]). That is, the Security Interest section of the Note and Security Agreement provided not only for the security interest in the property described, but also stipulated that a "security interest in the personal property and real property other than principal residence of Debtor is created by the Confession of Judgment Clause herein."[8] Thus, Petitioner was claiming and clearly disclosing both

[4] 15 U.S.C. §1639(a) (8); 12 C.F.R. §226.8(b)(5); Appendix, pp. A-31 and A-34, respectively.

[5] 12 C.F.R. §226.2(gg); 12 C.F.R. §226.202; Appendix, pp. A-33 and A-37, respectively.

[6] Appendix, p. A-39.

[7] The security interest in the pickup truck was retained pursuant to Article 9 of the Illinois UCC. The section of that article at issue in the case at bar is §9-204(2) which deals with the security interest in after-acquired consumer goods; Appendix, p. A-38.

[8] Appendix, p. A-45.

devices (*i.e.*, the UCC security interest and the confession of judgment) as security interests.

In relevant part, Regulation Z defines "security interest" as including both "security interests under the Uniform Commercial Code" and "confessed liens whether or not recorded."[9] Pursuant to this definition, Petitioner did not disclose the UCC provision[10] limiting the security interest in after-acquired consumer goods to those acquired by the debtor within 10 days after the secured party's having given value, because Petitioner had a security interest under both the UCC and the confession of judgment, and execution pursuant to a judgment by confession in Illinois is not so limited.[11]

Respondent's complaint in district court contended that the Bank disclosed that it was acquiring a security interest in after-acquired consumer goods acquired more than 10 days after the Bank gave value, but that Illinois UCC §9-204(2) (Ill. Rev. Stat. ch. 26, §9-204(2)) prohibited such a security interest. Respondent alleged that failure to disclose the 10-day limitation on a security interest in after-acquired consumer goods violated the Truth in Lending Act (15 U.S.C. §1639(a)(8)) and Regulation Z (12 C.F.R. §226.8(b)(5)) because it was misleading. Respondent also alleged that the same failure to disclose the 10-day limitation on after-acquired consumer goods violated the Illinois Consumer Fraud Act (Ill. Rev. Stat. ch. 121 1/2, §262) and the Illinois Consumer Installment Loan Act (Ill. Rev. Stat. ch. 74, §66(k)).

Although Respondent's complaint in district court consisted of six counts, three of which were for class

[9] 12 C.F.R. §226.2(gg); Appendix, p. A-33.

[10] Ill. Rev. Stat. ch. 26, §9-204(2); Appendix, p. A-38.

[11] Ill. Rev. Stat. ch. 77, §10; Appendix, p. A-39.

action relief and three of which were for individual relief, all six were based upon but one alleged violation by Petitioner, *i.e.*, disclosure of the allegedly overbroad and unlawful security interest which failed to exclude after-acquired consumer goods acquired more than 10 days after consummation. The complaint, however, did not address the issue of whether Petitioner's security interest under the Illinois confession of judgment extended to consumer goods acquired more than 10 days after the Bank gave value.

Bank filed a motion to dismiss which, after oral argument, was granted by the district court. The district court issued no opinion, and its order dismissing Respondent's complaint was noted in a docket entry.[12]

On appeal, the case at bar was consolidated with 18 other Truth in Lending actions (reported under the caption *Basham v. Finance America Corporation*) which had been either dismissed by the district court or upon which the district court granted summary judgment for defendants.

In reversing the district court with respect to disclosure of the security interest in after-acquired consumer goods, the Court of Appeals reiterated the long-standing Truth in Lending disclosure rule that the "legal extent of a security interest is determined according to state law."[13] The court cited §9-204(2) of the Illinois Uniform Commercial Code which provides that a security interest under an after-acquired property clause applies only to those consumer goods acquired within 10 days after the secured party gives value.

The Court of Appeals, however, did not even consider

[12] Appendix, p. A-29.

[13] 583 F.2d at 924; Appendix, p. A-13.

the federal definition of "security interest" for Truth in Lending purposes as found in 12 C.F.R. §226.2(gg)[14] in order to determine the types of "security interest" requiring disclosure in accordance with 12 C.F.R. §226.8(b)(5).[15] Nor did the Court of Appeals consider the legal effect of the Illinois confession of judgment which, like the UCC security interest, was also obtained pursuant to state law.

The Court of Appeals ruled only on the two counts of Respondent's original complaint alleging violation of the federal Truth in Lending Act, finding, as aforesaid, a violation for failure to disclose the 10-day limitation on the security interest in after-acquired consumer goods. The Court of Appeals did not rule on the two counts relating to alleged violation of the Illinois Consumer Fraud Act or on the two counts relating to alleged violation of the Illinois Consumer Installment Loan Act. However, one of the two Truth in Lending counts was for class action relief, which, if granted on remand, would subject Petitioner to substantial civil penalties.

Petitioner is a national banking association organized under the National Bank Act.[16] As such, it is an "instrumentalit(y) of the federal government, created for a public purpose."[17] Petitioner was created to serve the convenience and needs of its community and is in a position of public trust as a depository of public and private funds. Accordingly, this Petition for review of a judgment involving potentially large class action recoveries is of public concern and should be carefully

[14] Appendix, p. A-33.

[15] Appendix, p. A-34.

[16] 12 U.S.C. §§21, *et seq.*

[17] *Davis v. Elmira Savings Bank*, 161 U.S. 283, 284 (1896).

considered, particularly in view of the fact that the court below failed to consider relevant provisions of federal[18] and state[19] law and/or regulations on which Petitioner relied.

VI. BASIS FOR FEDERAL JURISDICTION

This action was brought by Respondent under the Truth in Lending Act (15 U.S.C. §§1601, *et seq.*) and the Board's Regulation Z (12 C.F.R. Part 226). Thus, original jurisdiction was vested in the United States District Court for the Southern District of Illinois under 15 U.S.C. §1640(e).[20]

VII. REASONS FOR GRANTING THE WRIT

1. The court below has decided a federal question involving the regulatory authority of the Board of Governors of the Federal Reserve System under the Truth in Lending Act in a way which is in direct conflict with an applicable decision of this Court.

The judgment below completely disregards the Regulation Z definition of "security interest"[21] and an Official Board Interpretation of that definition,[22] thus effectively striking down the broad regulatory authority delegated to the Board under 15 U.S.C. §1604 to "effectuate the purposes of [the Act], to prevent circumvention or evasion thereof, or to facilitate compliance therewith."[23]

[18] 12 C.F.R. §226.2(gg) and 12 C.F.R. §226.202; Appendix, pp. A-33 and A-37, respectively.

[19] Ill. Rev. Stat. ch. 77, §10 and ch. 110, §50(3); Appendix, p. A-39.

[20] Appendix, p. A-32.

[21] 12 C.F.R. §226.2(gg); Appendix, p. A-33.

[22] 12 C.F.R. §226.202; Appendix, p. A-37.

[23] Appendix, p. A-30.

In a secured transaction, the Truth in Lending Act requires that a creditor disclose a "description" of the security interest retained or acquired and a "clear identification of the property to which the security interest relates."[24] The Board expanded this statutory requirement to provide that "[i]f after-acquired property will be subject to the security interest, . . . this fact shall be clearly set forth in conjunction with the description or identification of the type of security interest held, retained or acquired."[25]

The Truth in Lending Act, however, contained no definition of the term "security interest," leaving that definition to the Board in its regulations. Given the vast array of security devices available throughout the country, the Board defined that term broadly in 12 C.F.R. §226.2(gg) to include ". . . any interest in property which secures payment or performance of an obligation," and provided further that the term includes, but is not limited to, "confessed liens whether or not recorded."

In order to leave absolutely no doubt about the scope of its definition of the term "security interest," the Board issued Official Board Interpretation §226.202 (34 *Federal Register* 8698) on May 26, 1969—more than one month before the effective date of the Truth in Lending Act. That Interpretation provides, in relevant part, as follows:

> In some of the States, confession of judgment clauses or cognovit provisions are lawful and make it possible for the holder of an obligation containing such clause or provision to record a lien on property of the obligor simply by recordation entry of judgment; the obligor is afforded no opportunity to enter a defense against such action prior to entry of the judgment.

[24] 15 U.S.C. §1639(a)(8); Appendix, p. A-31.

[25] 12 C.F.R. §226.8(b)(5); Appendix, p. A-34.

> Since confession of judgment clauses and cognovit provisions in such States have the effect of depriving the obligor of the right to be notified of a pending action and to enter a defense in a judicial proceeding *before* judgment may be entered or recorded against him, such clauses and provisions in those States are security interests under §226.2(gg) and for the purposes of §226.7(a)(7), §226.8(b)(5), and §226.9. This is the case even if the judgment cannot be entered until after a default by the obligor. (emphasis in original text)

A confession of judgment clause under the law of the State of Illinois[26] (discussed, *infra*) does, in fact, deprive the obligor of the right to be notified and enter a defense before entry of judgment; accordingly, a confession of judgment under Illinois law is, in fact, a "security interest" for federal Truth in Lending purposes.

This Court, in *Mourning v. Family Publications Service, Inc.*, 411 U.S. 356 (1973), confirmed the Board's authority to extend by regulation the coverage of the Truth in Lending Act to transactions payable in more than four instalments where no separate finance charge was imposed. In discussing the fact that the Truth in Lending Act, when passed, had to deal with the many forms of existing and future transactions, this Court made the following observation:

> To accomplish its desired objective, Congress determined to lay the structure of the Act broadly and to *entrust its construction* to an agency with the necessary experience and resources to monitor its operation. Section 105 [15 U.S.C. §1604] delegated to the Federal Reserve Board broad authority to promulgate regulations necessary to render the Act effective. (411 U.S. at 365; emphasis supplied)

[26] Ill. Rev. Stat. ch. 110, §50(3); Appendix, p. A-39.

Mourning, supra, dealt with the Board's authority to promulgate regulations "to prevent circumvention or evasion" of the Truth in Lending Act. In reversing the Court of Appeals for the Fifth Circuit in *Mourning, supra*, this Court said:

> Congress was clearly aware that merchants would evade the reporting requirements of the Act by concealing credit charges. In delegating authority to the Board, Congress emphasized the Board's authority to prevent such evasion. To hold that Congress did not intend the Board to take action against this type of manipulation would require us to believe that, despite this emphasis, Congress intended the obligations established by the Act to be open to evasion by subterfuges of which it was fully aware. As in *Gemsco*, the language of the enabling provision precludes us from accepting so narrow an interpretation of the Board's power. (411 U.S. at 371)

The statutory delegation of regulatory authority[27] also directs the Board in its regulations "to effectuate the purposes" of the Truth in Lending Act. It is clear, therefore, from *Mourning, supra*, that the Board has the authority in its "construction" of the Act to define the term "security interest" in such a way as to give effect to the intent of Congress.

The provisions of the Truth in Lending Act which require disclosure of a security interest[28] were added on the floor of the House of Representatives during debate on H.R. 11601, 90th Congress, First Session (1967)[29] and

[27] 15 U.S.C. §1604; Appendix, p. A-30.

[28] Finally enacted as 15 U.S.C. §1639(a)(8); Appendix, p. A-31.

[29] The amendment was added as paragraph (8) of §203(c) of H.R. 11601 and was included word for word in 15 U.S.C. §1639(a)(8).

have survived verbatim in the Act. Accordingly, it is appropriate to look at the legislative history of that amendment and the views of its advocates in order to ascertain the legislative intent. *United States v. Public Utilities Commission of California*, 345 U.S. 295 (1953); *United States v. Bryan*, 339 U.S. 323 (1950); *Addison v. Holly Hill Fruit Products, Inc.*, 322 U.S. 607 (1944).

In introducing the amendment requiring disclosure of a security interest, Representative William T. Cahill of New Jersey said that, without the amendment, the bill under consideration contained "serious and important omissions which should be corrected."[30] "These omissions," he said, "relate primarily to consumer credit extended on the security of mortgages and liens."[31] Saying that failure to disclose the existence of a security interest (particularly in a borrower's home) was an "unscrupulous fraud," Representative Cahill stated that his amendment was intended to correct cases in which the borrower is "never informed nor aware"[32] that his property is being made subject to a mortgage or lien.

The House of Representatives promptly agreed to the Cahill amendment and formally passed it on February 1, 1968.[33] On May 22, 1968, both the House of Representatives and the Senate agreed to the Conference Report[34] containing the Cahill amendment requiring disclosure of any security interest retained or acquired in connection with a consumer credit transaction.

[30] *Daily Congressional Record*, January 31, 1968, Vol. 114, p. H 631.

[31] *Ibid.*

[32] *Ibid.*

[33] *Daily Congressional Record*, Vol. 114, pp. H 708 and H 709.

[34] Report No. 1397, 90th Cong., 2d Sess. (1968); adoption recorded at *Daily Congressional Record*, Vol. 114, pp. H 4126 and S 6120.

The clear import of that floor amendment was to require notice to a consumer that his or her property secured payment of a debt. Inasmuch as an Illinois confession of judgment does, in fact, make that property available "without process,"[35] the Board's promulgation of §226.2(gg) and Interpretation §226.202 clearly comport with the legislative intent.

The judgment of the court below completely ignored the Board's definition of "security interest" in §226.2(gg) as interpreted by Official Board Interpretation §226.202 thus, in effect, vitiating the Board's delegated authority to "effectuate" the purposes of the Truth in Lending Act.

Both §226.2(gg) and Official Board Interpretation §226.202 became effective on July 1, 1969, the effective date of the Act, and have never been amended. Together, they reflect the Board's official position on what constitutes a "security interest" for purposes of disclosure. As such, they are a "contemporaneous construction" of the Act and are entitled to great deference. In *Power Reactor Development Co. v. International Union of Electrical, Radio and Machine Workers*, 367 U.S. 396 (1961), this Court stated: "[p]articularly in this respect due when the administrative practice at stake involves a contemporaneous construction of a statue by the men charged with the responsibility of setting its machinery in motion, making the parts work efficiently and smoothly while they are yet untried and new."[36] Accord, *Udall v. Tallman*, 380 U.S. 1 (1965).

In *Mourning, supra*, this Court confirmed that position with the following observation: "We have consistently held that . . . courts should defer to the informed experience and judgment of the agency to whom Congress delegated appropriate authority."[37]

[35] Ill. Rev. Stat. ch. 110, §50(3); Appendix, p. A-39.

[36] 367 U.S. at 408.

[37] 411 U.S. at 371.

Courts are not generally free to substitute their own discretion for that of an administrative agency that has kept within the bounds of its powers, unless the rules of that agency are ". . . the expression of a whim rather than an exercise of judgment."[38] Such is clearly not the case here. "Whim" is defined as a "capricious or eccentric idea, notion, or vagary usu. occurring suddenly or spontaneously."[39] Given the legislative history of the disclosure requirement for a security interest, the Board's definition of that term cannot by any stretch of semantic license be considered as a "whim." It gives effect to the clear and unambigous legislative intent regarding disclosure of a security interest by including within the definition of that term a contractual provision under which judgment may be entered without prior notice, thereby subjecting a debtor's property to seizure and sale upon execution of such a judgment.

Not only are §226.2(gg) and Official Board Interpretation §226.202 to be accorded great deference because they are a "contemporaneous construction" of the statue, but also because Congress has reviewed the statue a number of times and amended it at least five times[40] without modifying the Board's definition of "security interest" in 12 C.F.R. §226.2(gg) or its Interpretation §226.202. Thus, it may be presumed that the regulation and the interpretation reflect congressional intent.

[38] *American Telephone & Telegraph Co. v. United States*, 299 U.S. 232, 236 (1936).

[39] *Webster's Third New International Dictionary* (Springfield, Mass.: G. & C. Merriam Company (1961)).

[40] Act of October 26, 1970, Pub.L. 91-508; Act of October 28, 1974, Pub. L. 93-495; Act of January 2, 1976, Pub. L. 94-205; Act of February 27, 1976, Pub.L. 94-222; Act of March 23, 1976, Pub. L. 94-240.

A case directly in point is *National Labor Relations Board v. Bell Aerospace Co.*, 416 U.S. 267 (1974). That case involved the question of whether the National Labor Relations Act (NLRA), as amended by the Taft-Hartley Act, excludes "managerial employees" from the protection of NLRA. The Wagner Act (the original NLRA) did not expressly mention the term "managerial employee," but the National Labor Relations Board created that category by regulation as one which may not be included in a bargaining unit with rank-and-file employees. The Taft-Hartley amendments created several other categories of excluded employees but did not specifically mention "managerial employees." In holding that Congress intended to exclude "managerial employees" from the protection of NLRA, the Court said:

> [A] court may accord great weight to the longstanding interpretations placed on a statute by an agency charged with its administration. This is especially so where the Congress has re-enacted the statute without pertinent change. In these circumstances, congressional failure to revise or repeal the agency's interpretation is persuasive evidence that the interpretation is the one intended by Congress. (416 U.S. at 274)

Accord, *National Labor Relations Board v. Boeing Co.*, 412 U.S. 67, 75 (1973); *Griggs v. Duke Power Co.*, 401 U.S.424, 433-34 (1971); and *Red Lion Broadcasting Co. v. Federal Communications Commission*, 395 U.S. 367, 381 (1969).

Three of the five amendments to the Act passed by Congress since the Board promulgated 12 C.F.R. §226.2(gg) and Interpretation §226.202 have dealt specifically with the Board's regulatory authority by extending and enhancing it, not be restricting or otherwise diminishing it. None of those amendments have revised, repealed or otherwise altered either 12 C.F.R. §226.2(gg) or 12 C.F.R. §226.202. Under the foregoing authorities, the conclusion is inescapable that Congress intended the

Board's regulation and its interpretation of the regulation to stand. This Court should affirm the efficacy of 12 C.F.R. §226.2(gg) and 12 C.F.R. §226.202 as promulgated.

2. The court below has decided an important question of Illinois law in a way which is in conflict with applicable Illinois statutes and interpretations of those statutes by the Illinois courts.

Although the court below acknowledged that the "legal extent of a security interest is determined according to state law,"[41] and that "state law limitations on such security interests" determine the Truth in Lending disclosures required,[42] it then proceeded to ignore completely the Regulation Z definition of what constitutes a "security interest," and, equally important, it ignored completely the provisions of state law which determine the scope of one of the types of security interest therein defined—a confession of judgment such as that retained and disclosed by Petitioner.

Had Petitioner made the disclosure as directed by the court below, it would have, in fact, misled its customers, including Respondent, by indicating that its right to seize and sell consumer goods upon default on the obligation were limited to those consumer goods acquired within 10 days after the transaction when, in fact, the confession of judgment clause would have permitted it to levy against all such after-acquired property except that contractually excluded, irrespective of when acquired.

Section 50(3) of the Illinois Civil Practice Act[43] specifically provides for confessions of judgment "without process." That subsection stipulates that applications to

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[41] 383 F.2d at 924; Appendix, p. A-13.

[42] *Ibid.*

[43] Ill. Rev. Stat. ch. 110, §50(3); Appendix, p. A-39.

confess judgment may be made, *inter alia*, in the county in which "any property, real or personal" of the defendant is located. Although the constitutionality of that provision of law is not at issue in the case at bar, the Illinois Supreme Court has specifically upheld its constitutionality in *First National Bank in DeKalb v. Keisman*, 47 Ill. 2d 364, 265 N.E. 2d 662 (1970).

Under Illinois law, execution of a judgment by confession is no different from execution of any other kind of judgment. Upon delivery to the sheriff, an execution on any judgment become a lien upon all "goods and chattels of the person against whom it is issued."[44] Similarly, upon execution of any judgment, including a judgment by confession, "all and singular the lands, tenements, his real estate, goods and chattels" of the defendant "shall be liable to be sold."[45]

The courts of Illinois have consistently held that a judgment by confession becomes a lien on personal property upon execution of the judgment. For example, in *Haugens v. Holmes*, 41 N.E. 2d 109 (1942), the Appellate Court of Illinois, Second District, held that ". . . a lien is created, which attaches to real estate when the judgment is entered, and to personal property when the execution is placed in the hands of the sheriff or other proper officer."[46] Accord, *Fallows v. Continental & Commercial Trust & Savings Bank*, 235 U.S. 300, 302 (1914).

Thus, in the case at bar, by executing the confession of judgment, Respondent subjected *all* of his real estate (except any real property which is used or expected to be

[44] Ill. Rev. Stat. ch. 77, §9; Appendix, p. A-39.

[45] Ill. Rev. Stat. ch. 77, §10; Appendix, p. A-39.

[46] 41 N.E. 2d at 111.

used as the principal residence of Respondent—a contractual rather than a statutory exception[47]) to a lien upon entry of a judgment by confession. Similarly, Respondent subjected *all* of his personal property to a lien upon execution of any such judgment by confession. This right of a judgment creditor under Ill. Rev. Stat. ch. 77, §10 applies to all real and personal property and is not limited to consumer goods acquired within 10 days after the secured party gives value. Moreover, under Ill. Rev. Stat. ch. 110, §50(3), it may be exercised by the creditor *without prior notice* to the debtor.

Thus, disclosure of the 10-day limitation on the security interest in after-acquired consumer goods under the UCC in accordance with the judgment of the Court of Appeals would, in fact, mislead customers and therefore constitute a violation of Regulation Z.

In this connection, it should be noted that §9-204(2) of the Illinois Uniform Commercial Code (Ill. Rev. Stat. ch. 26, §9-204(2)) which provides the 10-day limitation on a security interest in after-acquired consumer goods was last amended and re-enacted effective July 1, 1973. However, Ill. Rev. Stat. ch. 77, §10 providing for execution of judgments, including judgments by confession, on *all* property of the debtor was last amended and re-enacted effective October 1, 1976. Thus, the provision of Illinois law giving the holder of a confession of judgment authority to levy upon *all* after-acquired consumer goods is a later expression of legislative intent than is the Illinois UCC provision limiting the security interest in after-acquired consumer goods to such goods acquired within 10 days after the secured party gives value. Should this Court perceive an irrevocable conflict between the two

[47] The Confession of Judgment clause (paragraph 2) of the Note and Security Agreement specifically excludes "any real property which is used or expected to be used as the principal residence of the undersigned Debtor(s)" from the operation of that clause; Appendix, p. A-45.

provisions of law, the later enactment by the legislature must control.

It is apparent from this statutory structure, however, that at least two separate and distinct security devices are available to creditors under Illinois law: a security interest under the Uniform Commercial Code and a confession of judgment. Since the Truth in Lending disclosures are determined by the extent of the security interest under state law, a creditor which retains a security interest in the form of a confession of judgment *must* disclose for Truth in Lending purposes a security interest in after-acquired property *without* the 10-day limitation stipulated in the Uniform Commercial Code.

It should be pointed out that although the court below cited as controlling its earlier opinion in *Tinsman v. Moline Beneficial Finance Co.*, 531 F.2d 815 (7th Cir. 1976), the contract and security agreement which was at issue in that opinion did *not* contain a confession of judgment. Thus, it is clearly distinguishable from the case at bar. Similarly, the decision in *Pollack v. General Finance Corp.*, 535 F.2d 295 (5th Cir. 1976), rehearing denied, 552 F.2d 1142 (5th Cir. 1977), cert. denied, 434 U.S. 891 (1977), cited also as controlling by the court below, did *not* involve a contract or security agreement containing a confession of judgment. Accordingly, it, too, may be distinguished from the case at bar.

The court below decided an important question of Illinois law which is clearly at odds with the unambiguous provisions of Illinois statutes and with opinions of the Illinois courts, including the Illinois Supreme Court. For that reason, this Court should affirm these provisions of Illinois law, just as the Eighth Circuit Court of Appeals did in *Turner v. Alton Banking & Trust Co.*, 181 F.2d 899 (1950), when it held that ". . . the courts of Illinois recognize such warrants [to confess judgment] as valid and permit judgments to be taken upon them."[48]

[48] 191 F.2d at 905.

3. The court below has decided that a creditor may be held liable for civil penalties under the Truth in Lending Act for having made disclosures under that Act in conformity with a rule, regulation, or interpretation of the Board of Governors of the Federal Reserve System, notwithstanding the provisions of 15 U.S.C. §1640(f) which bar such penalties. This is an important question of federal law which has not been, but should be, settled by this Court.

In 1969, the Board published a pamphlet entitled "What You Ought to Know About Federal Reserve Regulation Z" and included in that pamphlet a number of forms, called "model forms" by the Board, to guide creditors in making disclosures under Regulation Z. One of those forms, "DISCLOSURE STATEMENT OF LOAN (EXHIBIT E),"[49] disclosed the security interest in after-acquired property using the following language: "The Security Agreement will secure future or other indebtedness and will cover after-acquired property." This pamphlet is key to the decision in the case at bar, because it contained the following imprimature: "Material in this pamphlet has been prepared by the Board of Governors of the Federal Reserve System."

Since the material in the pamphlet had been "prepared" by the Board (not merely by its staff) and issued contemporaneously with Regulation Z, it must be construed as an "interpretation" of the regulation's requirements by the Board. It was an "administrative interpretation" which has been variously defined as "statements as to what the administrative officer thinks the statute or regulation means"[50] and "a clarification or explanation of existing laws or regulations."[51] The fact

[49] Appendix, p. A-41.

[50] *Gibson Wine Co. v. Snyder*, 194 F.2d 329, 331 (D.C. Cir. 1952).

[51] *Continental Oil Company v. Burns*, 317 F. Supp. 194, 197 (1970).

that it did not bear the designation as an "interpretation" is immaterial; it must be considered as such.

As this Court said in *Columbia Broadcasting System v. United States*, 316 U.S. 407 (1942), "[t]he particular label placed upon [the order] by the [Federal Communications] Commission is not necessarily conclusive, for it is the substance of what the Commission has purported to do and has done which is decisive."[52] Clearly, it is the substance of what the Board purported to do and did in its pamphlet which is decisive: it furnished a model form "which will show how a creditor may comply with the disclosure requirements of the provisions of paragraphs (b) and (d) of §226.8 of Regulation Z."[53]

At the time the pamphlet was prepared and issued in 1969, the Uniform Commercial Code had been adopted in 49 states and the District of Columbia;[54] thus, the Board was on reasonable notice that the 10-day limitation on after-acquired consumer goods was in effect in all but one state.[55] Nonetheless, the Board included a simple reference to "after-acquired property" without disclosing the 10-day limitation on after-acquired consumer goods.

Petitioner, relying on the fact that the "material" in the pamphlet, including the "model form," had been prepared by the Board, drafted its after-acquired property disclosure in strict conformity with the Board's model form.

More important, Petitioner relied on the clear wording

[52] 316 U.S. at 416.

[53] Appendix, p. A-41.

[54] MARTINDALE-HUBBELL LAW DIRECTORY, 1979 (Summit, N.J.: Martindale-Hubbell, Inc., 1979), Vol. VII at 4243.

[55] Louisiana; *Ibid.*

of §226.2(gg) of Regulation Z which defines a security interest as including "confessed liens whether or not recorded" and an Official Board Interpretation §226.202 which further defines "security interest" as including a confession of judgment of the type regularly taken (and taken in the case at bar) in the State of Illinois. Based on these provisions of Regulation Z, Petitioner did not disclose the 10-day limitation on after-acquired consumer goods as provided in the UCC, because the confession of judgment security interest taken by Petitioner applied to *all* after-acquired consumer goods, regardless of when acquired.

In 1974, Congress amended the Truth in Lending Act to provide that a creditor shall have no civil or criminal liability for ". . . any act done or omitted in good faith in conformity with any rule, regulation, or interpretation thereof by the Board."[56]

Since the case at bar is premised on a transaction entered into between Petitioner and Respondent more than two years after that 1974 amendment to the Truth in Lending Act, Petitioner's good faith conformity with the "model form" issued in an interpretative pamphlet "prepared" by the Board and with the clear and unambiguous provisions of §226.2(gg) and Interpretation §226.202 of Regulation Z protect it from liability for civil penalties, even if this Court should determine that the "model form," §226.2(gg), and Interpretation §226.202 are all invalid. This Court should confirm that no liability may be imposed against Petitioner for reason of its good faith conformity with a rule, regulation, or interpretation of the Truth in Lending Act by the Board.

[56] Pub. L. 93-495, §406; 15 U.S.C. §1640(f); Appendix, p. A-32.

VIII. CONCLUSION

The clear and unequivocal provisions of 12 C.F.R. §226.2(gg) and 12 C.F.R. §226.202 include within the definition of "security interest" any confession of judgment under which a lien on property of the obligor may be entered by recordation and without notice. Those provisions of Regulation Z clearly effectuate the purposes of the Truth in Lending Act and should be controlling in the case at bar. This Court should affirm that Respondent's confession of judgment in favor of Petitioner constituted a "security interest" under the Truth in Lending Act and Regulation Z.

Similarly, Illinois law quite clearly permits a creditor, where judgment has been confessed, to obtain a lien upon the property of the judgment debtor without notice and proceed to execute that judgment by seizure and sale of the debtor's property. The consumer goods which are subject to satisfaction of that judgment are not limited to consumer goods acquired within 10 days of the creditor's having given value. Therefore, this Court should affirm that where a creditor obtains a confession of judgment under Illinois law, that creditor is not required to disclose for Truth in Lending purposes that the security interest in after-acquired consumer goods is limited to such goods as are acquired within 10 days after the secured party gives value.

Since Petitioner in the case at bar relied upon the clear and unambiguous language of 12 C.F.R. §226.2(gg) and 12 C.F.R. §226.202 promulgated by the Board to implement the Truth in Lending Act and on "model forms" which had been "prepared" by the Board, civil liability may not be imposed on Petitioner until after such provisions of the regulation and "model form" have been determined to be "invalid" by this Court. Since this Court has made no such declaration of invalidity, this Court should affirm that no civil penalties are recoverable from Petitioner, even if this Court should now find those provisions invalid.

For the foregoing reasons, the Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

/s/ Milton W. Schober

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March 23, 1979

Supreme Court, U. S.
FILED
MAR 23 1979
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

October Term, 1978

No. 78-1468

FIRST NATIONAL BANK OF PEORIA,
Petitioner,

v.

GAREY R. CHILDS, et al.,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

APPENDIX TO PETITION FOR WRIT OF CERTIORARI

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APPENDIX TO PETITION FOR WRIT OF CERTIORARI

IN THE UNITED STATES COURT OF APPEALS
For the Seventh Circuit

Nos. 77-2029 and 77-2030
DAVID J. BASHAM, LINDA C. BASHAM, GREGORY D. VOGELSANG and DONNA I. VOGELSANG,
Plaintiffs-Appellants,

vs.

FINANCE AMERICA CORPORATION,
Defendant-Appellee.

No. 77-2031
GAREY R. CHILDS, on behalf of himself and all others similarly situated.
Plaintiff-Appellant,

vs.

FIRST NATIONAL BANK OF PEORIA,
Defendant-Appellee.

No. 77-2032
SUSAN M. STEELE,
Plaintiff-Appellant,

vs.

THORP CREDIT, INC., OF ILLINOIS,
Defendant-Appellee.

No. 78-1059
VICKIE SHOLL and DEBBIE BRASCHE, on behalf of themselves and all others similarly situated,
Plaintiffs-Appellants,

vs.

GENERAL FINANCE CORPORATION OF ILLINOIS, a corporation,
Defendant-Appellee.

No. 78-1060
BRUCE P. DORETHY, on behalf of himself and all others similarly situated,
Plaintiff-Appellant,

vs.

BUSHNELL FINANCE COMPANY,
Defendant-Appellee.

No. 78-1061
JAMES E. ROUNDS,
Plaintiff-Appellant,

vs.

HOUSEHOLD FINANCE CORPORATION,
Defendant-Appellee.

No. 78-1062
DEAN BRASCHE and CHARLENE BRASCHE,
Plaintiffs-Appellants,

vs.

GENERAL FINANCE CORPORATION OF ILLINOIS, a corporation,
Defendant-Appellee.

No. 78-1063
JAMES E. ROUNDS,
Plaintiff-Appellant,

vs.

GENERAL FINANCE CORPORATION OF ILLINOIS, a corporation,
Defendant-Appellee.

No. 78-1064
ROBERT N. SHARP and MARY E. SHARP,
Plaintiffs-Appellants,

vs.

GENERAL FINANCE CORPORATION OF ILLINOIS, a corporation,
Defendant-Appellee.

No. 78-1065
RICHARD D. CORBIN and CHERI CORBIN,
Plaintiffs-Appellants,

vs.

GENERAL FINANCE CORPORATION OF ILLINOIS, a corporation,
Defendant-Appellee.

No. 78-1066
FRED H. TIBBITS, VICKEY L. TIBBITS, and JAMES S. BRANNON, Trustee in Bankruptcy for Fred H. Tibbits,
Plaintiffs-Appellants,

vs.

GENERAL FINANCE CORPORATION OF ILLINOIS, a corporation,
Defendant-Appellee.

No. 78-1067
KEITH A. DEJAYNES, DIANE M. DEJAYNES, and RAYMOND E. BURGER, Wage Earner Trustee,
Plaintiffs-Appellants,

vs.

GENERAL FINANCE CORPORATION OF ILLINOIS, a corporation,
Defendant-Appellee.

No. 78-1068
JEFFREY C. BROWN and CINDY S. BROWN,
Plaintiffs and Counter-Defendants-Appellants,

vs.

GENERAL FINANCE CORPORATION OF ILLINOIS, a corporation,
Defendant and Counter-Plaintiff-Appellee.

No. 78-1069
RICK JOHNSON,
Plaintiff-Appellant,

vs.

MID AMERICA CREDIT, INC., now HEIGHTS FINANCE CORPORATION,
Defendant-Appellee.

No. 77-2179
ROBERT N. SHARP and MARY E. SHARP,
Plaintiffs-Appellants,

vs.

THE FIRST NATIONAL BANK OF PEORIA,
Defendant-Appellee.

No. 77-2180
FORT MADISON BANK & TRUST CO.
Plaintiff and Counter-Defendant-Appellee,

vs.

CHARLES E. COLLINS and PATRICIA D. COLLINS,
Defendants and Counter-Plaintiffs-Appellants and Third-Party Plaintiffs,

vs.

HART MOBILE HOMES, INC.,
Third-Party Defendant-Appellee.

No. 78-1058
In the Matter of:
WILLIAM ERNEST ANDERSON,
Debtor.

Appeal of:
WILLIAM ERNEST ANDERSON,
Debtor, and

RAYMOND E. BURGER,
Wage Earner Trustee.

No. 78-1198
SHERYL K. HAWK and FRANKLIN HAWK,
Plaintiffs-Appellants,

vs.

GENERAL FINANCE CORPORATION OF ILLINOIS, a corporation,
Defendant-Appellee.

Appeals from the United States District Court for the Southern Division of Illinois, Peoria Division.
Civil Nos. 77-1053 and 77-1059, 77-1072, 77-1060, 77-1080, 77-1081, 77-1083, 77-1088, 77-1089, 77-1090, 77-1093, 77-1102, 77-1107, 77-1116, 77-1117, 77-1087, 77-1119 and 77-1120, 77-1139 and 78-1107—Bankruptcy Nos. 77-10547 and 77-10548.
Robert D. Morgan, *Judge.*

Argued June 14, 1978—Decided August 16, 1978

Before CUMMINGS, SPRECHER and BAUER, Circuit Judges.

SPRECHER, Circuit Judge.

This case is a consolidation of nineteen Truth in Lending actions which were either dismissed or upon

which summary judgment was granted for defendants. Numerous issues are raised, the primary ones being the liability of creditors when disclosures are made in conformity with Federal Reserve Board ("Board") regulations, official staff interpretations or unofficial staff letters; the extent of required disclosure by a creditor of a security interest in after-acquired property; the compliance of various loan forms with the requirement that the disclosures therein be made clearly, conspicuously and in meaningful sequence; and whether the one-year statute of limitations on Truth in Lending actions applies to counterclaims filed by a debtor in response to a secured creditor's claim or a claim for reclamation.

I

These appeals arise out of alledged violations of the Truth in Lending Act ("TILA"), 15 U.S.C. §§ 1601, *et seq.*, the regulations promulgated thereto ("Regulation Z"), 12 C.F.R., part 226, the Illinois Uniform Commericial Code ("UCC"), Illinois Revised Statutes 1975, chapter 26, §§ 1-101, *et seq.*, and the Illinois Consumer Fraud Act, Illinois Revised Statutes 1975, chapter 121½, §§ 261, *et seq.*

All of the creditors and the transactions described in the complaints are subject to regulation under TILA, Regulation Z, the Uniform Commercial Code and the Consumer Fraud Act. All of the transactions were consumer credit transactions within the meaning of 15 U.S.C. § 1602(h), in that the party to whom credit was offered or extended was a natural person, and the money, property, or services which were the subject of the transaction were primarily for personal, family, household, or agricultural purposes. All but one of the nineteen appeals involve close-end consumer loans under 15 U.S.C. § 1639.[1]

[1] One of the appeals, *Fort Madison Bank and Trust Co. v. Collins*, (No. 77-2180) is a sale by a mobile home dealer under 15 U.S.C. § 1638. The contract in the *Fort Madison Bank* case was immediately assigned by the dealer to the bank in a typical dealer-paper transaction. No appeal here involves the extension of "open-end" credit under 15 U.S.C. § 1637.

All of these cases were decided adversely to plaintiffs upon motions to dismiss or motions for summary judgment and therefore turn almost entirely on the resolution of questions of law involving construction of the statute, regulations and loan documents. For this reason, combined with the fact that most of the legal issues involve more than one case, the facts of individual cases will be discussed only where necessary to resolve an issue or where differing facts would dictate a different result. Otherwise, in the interest of brevity, only a general description of the transaction involved will be given.

II

Plaintiffs' first claim[2] is that defendants failed to disclose "[t]he amount of credit of which the obligor will have the actual use, or which is or will be paid to him or for his account or to another person on his behalf" in

[2]The twelve cases involving this claim are 78-1059 through 78-1069 and 78-1198. Plaintiffs also argue that cases 77-2029 and 77-2030 involve this claim. A perusal of the record indicates that the original complaints raised only the issue of an improper security interest on the part of defendants in these latter cases. While a motion to amend the complaint in each case was filed, these motions, according to the docket sheet, were withdrawn by plaintiffs on September 2, 1977. Therefore, this issue was neither raised nor ruled upon in the district court and is therefore not before us on appeal in those two cases. For the same reason, plaintiffs' additional claim in 77-2030 that credit life insurance charges were not disclosed is not before us.

Plaintiffs also argue that 78-1058 involves this issue. That case, however, was decided solely on a statute of limitations question and this is the only issue before us on appeal of that case. *See* Part V *infra*.

violation of 15 U.S.C. § 1639(a).[3] This section of the statute requires that a creditor disclose that amount designated by the above quotation in addition to all charges for insurance or other purposes, individually itemized. Finally, these two figures must be added together and disclosed to determine the total amount financed.

Defendants do not deny that they failed to disclose the amount required by § 1639(a)(1). Rather, they contend that their disclosure forms, which only included the individual itemized charges and the total amount financed, were in full compliance with the Board's Regulation Z § 226.8(d)(1), 12 C.F.R. § 226.8(d)(1), which requires disclosure of:

> The amount of credit, . . . which will be paid to the customer or for his account or to another person on his behalf, including all charges, individually itemized, which are included in the amount of credit extended but which are not part of the finance charge, using the term "amount financed."

A careful reading of this portion of Regulation Z indicates that it requires only the disclosures spelled out in §§ 1639(a)(2) and (a)(3) of the TILA, which defendants here

[3]15 U.S.C. § 1639(a) provides in relevant part:

(a) Any creditor making a consumer loan or otherwise extending consumer credit in a transaction which is neither a consumer credit sale nor under an open end consumer credit plan shall disclose each of the following items, to the extent applicable:

(1) The amount of credit of which the obligor will have the actual use, or which is or will be paid to him or for his account or to another person on his behalf.

(2) All charges, individually itemized, which are included in the amount of credit extended but which are not part of the finance charge.

(3) The total amount to be financed (the sum of the amounts referred to in paragraph (1) plus the amounts referred to in paragraph (2)).

gave, thereby implicitly allowing the actual proceeds of the loan to remain undisclosed.[4]

Assuming, without deciding, that defendants must comply with the statute even where it differs from the Board's regulations,[5] it is clear that failure to disclose the actual proceeds of the loan violates § 1639(a)(1) of the TILA. Thus we are presented with a situation, accounted for by Congress in 15 U.S.C. § 1640(f), where action in good faith conformity with Regulation Z is found violative of the TILA:

> No provision of this section or section 1611 of this title imposing any liability shall apply to any act done or omitted in good faith in conformity with any rule, regulation, or interpretation thereof by the Board or in conformity with any interpretation or approval by an official or employee of the Federal Reserve System duly authorized by the Board to issue such interpretations or approvals under such procedures as the Board may prescribe therefor, notwithstanding that after such act or omission has occurred, such

[4] This conclusion is also reached in *Pollock v. General Finance Corp.*, 535 F.2d 295, 298-99 (5th Cir. 1976), *aff'd on rehearing*, 552 F.2d 1142, 1143-44 (5th Cir. 1977), *cert. denied*, 434 U.S. 891, 98 S.Ct. 265, 54 L.Ed.2d 176 (1977). It is to be noted, however, that the simple arithmetical procedure of subtraction will yield the "undisclosed" figure.

[5] Defendants argue that the Board has authority under 15 U.S.C. § 1604 to provide for variations and exceptions to the statute such as that involved here. While we need not decide that issue in this case, we note that a similar argument was rejected in *Pollock v. General Finance Corp.*, 552 F.2d 1142, 1143-44 (5th Cir. 1977), *cert. denied*, 434 U.S. 891, 98 S.Ct. 265, 54 L.Ed.2d 176 (1977). Defendants also claim that Congress has acquiesced in the Board's construction of the statute in this manner since 1969 and therefore this construction must be given weight. *See generally Norwegian Nitrogen Products Co. v. United States*, 288 U.S. 294, 313, 53 S.Ct. 350, 77 L.Ed. 512 (1933); *Zemel v. Rusk*, 381 U.S. 1, 11, 85 S.Ct. 1271, 14 L.Ed.2d 179 (1965). Given our disposition of the broader issue of liability, we need not address this argument.

> rule, regulation, interpretation, or approval is amended, rescinded, or determined by judicial or other authority to be invalid for any reason.

Since defendants' disclosures have followed the requirements of Regulation Z[6] no civil liability may be imposed upon them according to § 1640(f) for having failed to make the disclosure required by § 1639(a)(1). Therefore, the district court properly concluded that no claims existed on this basis.[7]

III

Plaintiffs claim that defendants' loan documents attempt to grant the creditor an overbroad and unlawful

[6] *See also* Federal Reserve Board Letter No. 982 (December 24, 1975) CCH Consumer Credit Guide paragraph 31,321, to the effect that loan proceeds need not be disclosed. The statute itself mandates that disclosures be "in accordance with the regulations of the Board." 15 U.S.C. § 1631(a).

[7] Section 1640(f) limits its exemption from liability to "good faith" conformity to regulations and interpretations. We do not reach the issue of whether continued adherence by the creditors to their present form of disclosure after at least one circuit has ruled that it is illegal vitiates their "good faith." *See Pollock v. General Finance Corp.*, 535 F.2d 295 (5th Cir. 1976), *aff'd on rehearing*, 552 F.2d 1142 (7th Cir. 1977), *cert. denied*, 434 U.S. 891, 98 S.Ct. 265, 54 L.Ed.2d 176 (1977).

Nor do we decide whether mere coincidental conformity with the Board's regulations are sufficient for exculpation under § 1640(f). *See Jones v. Community Loan & Inv. Corp.*, 544 F.2d 1228, 1231-32 (5th Cir. 1976), *cert. denied*, 431 U.S. 934, 97 S.Ct. 2642, 53 L.Ed.2d 250 (1977). The regulation relied upon here became effective on July 1, 1969, the same day as the TILA, and has never been amended. Reliance on this regulation as initial and continuous guidance in complying with the statute is apparent from the disclosure forms used by defendants.

Finally, in No. 78-1198, the issue of whether a TILA claim passes to the wage earner trustee in a Chapter XIII bankruptcy proceeding is argued. In light of our conclusion that no civil liability exists here, we do not decide that issue. *See also Matter of Dickson*, 432 F.Supp. 752 (W.D.N.C.1977).

security interest in the debtors' after-acquired consumer goods.[8] A creditor desiring to hold a security interest must make the following disclosure under 15 U.S.C. § 1639 (a)(8):

> A description of any security interest held or to be retained or acquired by the creditor in connection with the extension of credit, and a clear identification of the property to which the security interest relates.

Regulation Z, § 226.8(b)(5), 12 C.F.R. § 226.8(b)(5) requires:

> A description or identification of the type of any security interest held or to be retained or acquired by the creditor in connection with the extension of credit, and a clear identification of the property to which the security interest relates or, if such property is not identifiable, an explanation of the manner in which the creditor retains or may acquire a security interest in such property which the creditor is unable to identify. In any such case where a clear identification of such property cannot properly be made on the disclosure statement due to the length of such identification, the note, other instrument evidencing the obligation, or separate disclosure statement shall contain reference to a separate pledge agreement, or a financing statement, mortgage, deed of trust, or similar document evidencing the security interest, a copy of which shall be furnished to the customer by the creditor as promptly as practicable. If after-acquired property will be subject to the security interest, or if other or future indebtedness is or may be secured by any such property, this fact shall be clearly set forth in conjunction with the description or identification of the type of security interest held, retained or acquired.

[8]This issue involves appeals 77-2029 through 77-2032. Plaintiffs claim that 77-2180 is also involved. A perusal of the record indicates that 77-2180 was decided solely on a statute of limitations question and is therefore the issue of a security interest and that case is not before us on appeal. *See* Part V *infra*.

The legal extent of a security interest is determined according to state law and section 9—204(2) of the Illinois Uniform Commercial Code (UCC) Ill. Rev. Stat. ch. 26, § 1-101 *et seq.*, provides in relevant part:

> No security interest attaches under an after-acquired property clause to consumer goods other than accessions (Section 9-314) when given as additional security unless the debtor acquires rights in them within 10 days after the secured party gives value.

Therefore, plaintiffs argue that defendants violated section 1639(a)(8) of the TILA and section 226.8(b)(5) of Regulation Z by claiming to cover more than UCC section 9-204(2) allows and by failing to disclose the time limitation imposed on such clauses by this section of the UCC.

The leading case in this circuit on the after-acquired property security interest is *Tinsman v. Moline Beneficial Finance Co.*, 531 F.2d 815 (7th Cir. 1976). There this court held that disclosures of security interests that fail to indicate state law limitations on such security interests do not fulfill the disclosure requirements of the TILA and Regulation Z. In particular, debtors' security interest there covered more property than allowed by the statute and also did not disclose that any security interest was limited to property acquired within 10 days after the secured party gives value.

The security interest clauses in three of the four cases involved here do not contain any reference to a time

limitation.[9] This failure to indicate this limitation on the security interest violates the TILA and Regulation Z under our holding in *Tinsman*. *See also Pollock v. General Finance Corp.*, 535 F.2d 295, 300 (5th Cir. 1976), *aff'd on rehearing*, 552 F.2d 1142, 1144-45 (5th Cir. 1977), *cert. denied*, 434 U.S. 891, 98 S.Ct. 265, 54 L.Ed.2d 176 (1977); *Johnson v. Associates Finance, Inc.*, 369 F.Supp. 1121, 1122-23 (S.D.Ill.1974).

Defendants, however, claim reliance on unofficial staff opinions of the Board for the contention that the disclosure here was made in good faith reliance upon Board interpretations of the TILA and therefore subject to no civil liability under section 1640(f). *See* Federal Reserve Letters Nos. 829, 983 and 1053, CCH Consumer Credit Guide, paragraphs 31,151, 31,323, and 31,393.[10]

[9] Nos. 77-2029, 77-2030 and 77-2031. No. 77-2031 also appears to improperly claim an interest in more than merely accessions. The security agreement states flatly that it "will cover after acquired property," no limitation of the kind of property covered being given. Defendants argue that they have in good faith relied on Exhibit E of the Model Forms provided with a pamphlet entitled, "What You Ought to Know About Truth in Lending" and therefore should be immune from liability under 15 U.S.C. § 1640(f). These forms, however, are merely samples "solely for purposes of demonstration" as the disclaimer at the bottom of the form states. *See Johnson v. Associates Finance, Inc.*, 369 F.Supp. 1121, 1123 (S.D.Ill. 1974); *Bone v. Hibernia Bank*, 354 F.Supp. 310, 311 (N.D.Cal.1973), *reversed on other grounds*, 493 F.2d 135 (9th Cir. 1974). Reliance on such a form, where it is contrary to the law of the jurisdiction, is not sufficient to insulate defendants from liability under § 1640(f).

[10] The extent of reliance on these letters to support defendants' position is itself open to question. Letter 829, August 22, 1974, seems to indicate that the strictures of state law must be followed in describing the security interest. While Letter 983, December 30, 1975, seems to backtrack from this position, Letter 1053, May 28, 1976, followed and stated:

> It appears from your letter that these creditors are disclosing a security interest in "all after-acquired property" or "all after-acquired property including all attachments, substitutions, and replacements." If, in fact, the applicable State law only permits acquisition of a security interest in after-acquired property acquired within a certain period of time, then such a statement would be improper under Regulation Z.

This ignores the fact that these unofficial staff opinion letters are explicitly excepted from reliance under Regulation Z, section 226.1(d)(4)(iii). The latest interpretation from the Board, post-dating the staff letters relied on by defendants, is an Official Staff Interpretation which concludes that the statement that a creditor holds "a security interest under the Uniform Commercial Code" is a sufficient description when the creditor obtains a security interest under the UCC. *See* Federal Reserve Board Official Staff Interpretation (November 19, 1976), CCH Consumer Credit Guide, paragraph 31,491. Without deciding whether this Official Staff Interpretation is consistent with *Tinsman*, we note that defendants cannot rely on this Official Interpretation since the language in their disclosure forms makes no mention of the UCC.

In holding that defendants cannot rely on the unofficial staff letters under the facts of this case, we realize that such letters are an important informative function of the staff of the Board which, although not binding on a court, are entitled to deference and may prove helpful to a decision in a given case. *Philbeck v. Timmers Chevrolet, Inc.*, 499 F.2d 971, 976-77 (5th Cir. 1974); *Frank v. Reserve Consumer Discount Co.*, 398 F.Supp. 703 (D.Pa.1975). In the instant cases, however, the disclosure forms give a clearly mistaken impression of the extent of time the security interest may be in effect. As we stated in *Tinsman v. Moline Beneficial Finance Company*, 531 F.2d 815, 818 (7th Cir. 1976):

> A reading of the form would lead the debtors to conclude erroneously that the security interest extends to all [consumer] goods . . . at any time the loan agreement is in effect, even though Illinois law precludes such a security interest covering consumer goods acquired more than 10 days after the secured party gives value.

The disclosures required here are not onerous and their uniformity is enhanced by the fact that the UCC has

been adopted by 49 states. Moreover, the fact that defendants cannot in actuality claim any greater security interest than is allowed by state law is of no consequence. Although the inclusion of language in the forms which does not limit the security interest to 10 days fails to extend that interest beyond the limited period, it does mislead the consumer. As was stated in *Ives v. W.T. Grant Company*, 522 F.2d 749, 761 (2d Cir. 1975):

> Whether [a creditor] actually retains a security interest is irrelevant. On its face, the contract provides for a security interest and for [a creditor] to reveal later that there is none is hardly the type of disclosure Congress thought would "permit consumers to compare the cost of credit among different creditors and to shop effectively for the best credit buy."

Therefore the district court erred in dismissing these claims.

In the fourth case, No. 77-2032, the security agreement explicitly excepts "after acquired consumer goods acquired more than 10 days after the date hereof." Defendant in this case has complied with the TILA and Regulation Z.[11] Dismissal of the complaint was properly allowed by the district court.

[11] Plaintiffs also attempt to premise a claim on language in the security interest purporting to cover "all substitutions and replacements." Assuming that substitutions and replacements for collateral cannot be the subject of a security interest after 10 days (*See Tinsman v. Moline Benefical Finance Co.*, 531 F.2d 815, 816 (7th Cir. 1976)), such goods must, by definition, be considered as being "of the same or similar type" as those secured. Thus the 10-day limitation contained in the agreement covers these goods as well:

> Debtor further grants to Secured Party a security interest in all goods, personal property and chattels of the same or similar type or kind to that described above now owned or hereafter acquired, excepting only after acquired consumer goods acquired more than 10 days after the date hereof.

No valid claim of violation is therefore made.

IV

The next contention is that defendant[12] violated the TILA and Regulation Z, 12 C.F.R. § 226.6(a), which provides in relevant part:

> (a) Disclosures; general rule. The disclosures required to be given by this part shall be made clearly, conspicuously, in meaningful sequence, in accordance with the further requirements of this section, and at the time and in the terminology prescribed in applicable sections.

See also 15 U.S.C. § 1631(a). This regulation is designed to insure that the disclosures follow a logical order and are not scattered throughout the agreement. *See* Staff Opinion Letter No. 780 (April 10, 1974), CCH Consumer Credit Guide paragraph 31,102.

Allen v. Beneficial Finance Company of Gary, 531 F.2d 797 (7th Cir.), *cert. denied*, 429 U.S. 885, 97 S.Ct. 237, 50 L.Ed.2d 166 (1976), deals with the issue of meaningful disclosure. According to *Allen*, 531 F.2d at 801, "meaningful sequence" requires that disclosure statements basically must follow two criteria:

> Thus, meaningful sequence first requires groupings of logically related terms. Second, meaningful sequence requires that the terms in these groupings be arranged in a logically sequential order emphasizing the most important terms.

Plaintiffs complain that the disclosure statements make disclosures horizontally instead of vertically. This fact does not, however, make the disclosures misleading. The

[12] This issue involves Nos. 78-1059 and 78-1061 through 78-1069. Plaintiffs also claim that Nos. 77-2029, 77-2030 and 78-1058 involve this issue. For the reasons discussed in note 2 *supra*, however, this issue was not reached in those cases and is not before us on appeal.

key factor is reasonable proximity and comprehensibility. As Staff Opinion Letter 780 (April 10, 1974) states:

> We realize that it is not always practical to list the items in vertical order, but in keeping with the purpose of the Truth in Lending Act, they should be placed in reasonable proximity to each other so that the customer will not be required to search for any arithmetical items which should logically follow a previous one.

The forms involved here satisfy this requirement even though the disclosures are horizontal in nature.

Plaintiffs next suggest that the use of a subtractional disclosure in several of the forms violates the "meaningful sequence" rule. While it was noted in *Allen*, 531 F.2d at 802, 804, that the subtractional method is not favored, the court stated that the "requirements of meaningful sequence cannot be applied mechanically or rigidly."[13] In *Allen* the statement contained some figures listed horizontally and others listed in two vertical columns. Groupings of terms were located at random. The columns of numbers appeared to add up when in reality they did not. The same charge was listed twice under two difference titles. The court, 531 F.2d at 802, described this attempt at disclosure as follows:

> The present defendant has failed in almost every respect to provide disclosures in meaningful sequence in the present disclosure statement. The court below cited ten instances in which the disclosure statement failed to set forth the required information in a meaningful sequence.

[13] Subsequent to the decision in *Allen*, the Board issued Staff Opinion Letter No. 1047 (May 20, 1976), CCH Consumer Credit Guide paragraph 13,387, commenting on *Allen* that no particular form of statement was required so long as the relationship among the terms is clear, thereby providing the consumer with a clear and adequate basis on which to shop for credit.

In contrast, the subtractional disclosure statements here contain a logically sequential series of disclosures beginning with the total amount of required payments, the finance charge, the amount financed, the charges for credit life, and credit disability insurance, the total number of payments and the annual percentage rate. Perusal of the forms indicate that while this particular sequence is not additional, it is logical and meaningful. This is all that the TILA, Regulation Z and the *Allen* decision require.[14] *See also* Official Staff Interpretation (March 21, 1977), CCH Consumer Credit Guide paragraph 31,552. Therefore, the decision of the district court that the disclosures in these forms were made in a "meaningful sequence" must be sustained.

V

Two of the cases[15] concern the issue of whether, after filing a petition under Chapter XIII of the Bankruptcy Act, the debtors may respond to a filing of a claim or a reclamation petition by alleging TILA violations on the part of the creditor, even though the TILA claim is beyond the statutory limitation period. Plaintiffs contend that their action is not time barred since their claim is one of recoupment.

The limitation period for TILA claims provides in 15 U.S.C. § 1640(e):

[14] *See generally* Annotation, "Meaningful Sequence" Requirement of Regulation Z (12 C.F.R., pt. 226.6(a)), 33 A.L.R.Fed. 751 (1977).

[15] Nos. 77-2180 and 78-1058. In 77-2180, plaintiffs also argue that the creditors violated Regulation Z § 226.8(a). For the reasons discussed in note 8 *supra*, this issue is not before us. Also, in light of our disposition of the statute of limitations issue, plaintiffs' further argument relating to the vacating of the default judgment need not be addressed. In any case, the district court has wide discretion in granting such relief. *See* Fed.R.Civ.P. 60(b) and Bankruptcy Rules 755(b) and 924.

> Any action under this section may be brought in any United States district court, or in any other court of competent jurisdiction, within one year from the date of the occurrence of the violation.

There is no dispute that debtors failed to make a claim within one year from the date of the occurrence. *See also Goldman v. First National Bank of Chicago*, 532 F.2d 10 (7th Cir.), *cert. denied*, 429 U.S. 870, 97 S.Ct. 133, 50 L.Ed.2d 150 (1976). Rather, debtors claim that somehow their action was revived when creditors made claims in response to debtors filing for voluntary bankruptcy under Chapter XIII. The bankruptcy judge and the district court rejected this claim in both cases.

Failure to bring an action for damages within the one-year limitation period bars the action. *See Jamerson v. Miles*, 421 F.Supp. 107 (N.D.Tex.1976); *Fenton v. Citizens Savings Association*, 400 F.Supp. 874 (C.D.Mo.1975). Where a counterclaim seeks to assert a separate cause of action for an independent wrong, it generally may not be instituted after the applicable statute of limitations has expired. *See Smith-Johnson Steamship Corp. v. United States*, 231 F.Supp. 184 (D.Del.1964). We believe that this rule applies to these cases as well. Debtors argue, however, that a counterclaim is not barred where it seeks "recoupment" rather than affirmative relief. This argument must fail here even assuming that the doctrine of recoupment may assist the claiming party in a given situation. *See Bull v. United States*, 295 U.S. 247, 262, 55 S.Ct. 695, 79 L.Ed. 1421 (1935). The TILA claim presented by debtors seeks affirmative damages under 15 U.S.C. § 1640(a)(2). They do not claim however that they were actually damaged in any way as a result of the claimed TILA violations.[16] Nor do they claim that the alleged TILA

[16] *See* 15 U.S.C. § 1640(a)(1). We express no opinion concerning the availability of a counterclaim after the limitation period where debtors would seek to have the recovery by creditor reduced by the amount of actual damages sustained by debtors in, for example, overpayment of finance charges. *See also* 15 U.S.C. § 1640(h). Certainly, however, such a claim is much closer to the concept of "recouping" something unlawfully taken by the creditor.

violations somehow negate the validity of the underlying loan transaction.[17] The TILA claim is not directed at or an answer to the underlying debt.[18]

Viewed in this manner, debtors in bankruptcy have brought suit for affirmative relief based on alleged TILA violations. The fact that the creditors being sued have filed claims in the bankruptcy proceeding has no material relevance. Debtors action is barred by the one-year statute of limitations contained in 15 U.S.C. § 1640(e).[19] The design of TILA was to provide protection to consumers by affording them meaningful disclosure and thereby an opportunity to shop for credit. It was not designed, nor should it be used to thwart, the valid claims of creditors. The district court properly dismissed these claims on the authority of the statute of limitations.

VI

In *Sharp v. First National Bank of Peoria*, No. 77-2197, plaintiffs, husband and wife, allege that defendant failed

[17] Thus, it has been held that the one-year limitation period does not apply to an action for rescission under 15 U.S.C. § 1635. *See Littlefield v. Walt Flanagan & Co.*, 498 F.2d 1133 (10th Cir. 1974).

[18] It has been held that a TILA claim and the underlying loan transaction are not so related as to be the subject of a compulsory counterclaim under Rule 13(a), Federal Rules of Civil Procedure. *See Gammons v. Domestic Loans of Winston-Salem, Inc.*, 423 F.Supp. 819 (M.D. N.C. 1976), and cases cited therein.

[19] We recognize that the state courts have split on this question. *See generally* Annotation, Time Limitations Under 15 U.S.C. § 1640(e) on Truth in Lending Suits, 36 A.L.R.Fed. 657 (1978); Note, *Restrictions on Defenses and Counterclaims Based on Truth In Lending Violation*, 13 Wake Forest L.Rev. 189 (1977). This split is attributable mainly to a variation in state statutes. Even ignoring the questionable use of state statutes to modify a federal cause of action controlled by an explicit federal limitations period, such statutes do not bind the federal courts. *See also* 15 U.S.C. § 1640(h), which denies any offset under § 1640(a)(2) unless the liability has been judicially determined.

to give them any documents or disclosure statements necessary to comply with the TILA or the Motor Vehicle Retail Installment Sales Act of Illinois, Ill.Rev.Stat., ch. 121½, § 573. Defendant filed a motion to dismiss and attached a copy of a loan document signed by Robert N. Sharp. Plaintiffs responded by filing only an affidavit by Mary Sharp. The district court granted defendant's motion to dismiss.

Plaintiffs' claim under the Illinois Statute is without merit. The statute is designed to apply where a retail automobile sales establishment provides or procures financing for the vehicles it sells, not where independent bank financing is obtained. *See generally Rivera v. Dick McFeely Pontiac, Inc.*, 431 F.Supp. 506 (N.D.Ill. 1977); *Lucas v. Park Chrysler Plymouth, Inc.*, 62 F.R.D. 399 (N.D.Ill. 1974). Thus, the section which plaintiffs claim defendant violated provides in relevant part:[20]

> The seller shall deliver to the buyer a copy of the retail installment contract signed by the seller. Any acknowledgment by the buyer of delivery of a copy of the contract must be printed or written in a size equal to at least 10 point bold type and, if contained in the contract, must appear directly above the legend required above the buyer's signature by paragraph (1) of Section 3. The Buyer's written acknowledgement of delivery of a copy of the contract conforming to the requirements of this Act is conclusive proof of such delivery and of compliance with this Section in any action by or against an assignee of the contract without knowledge to the contrary when he purchases the contract.

This section clearly contemplates the situation where the

[20] Ill.Rev.Stat., ch. 121½, § 573.

automobile dealer, the "seller,"[21] arranges the financing and is therefore not applicable to the bank in this case.

Regarding the TILA claim, defendant filed a motion to dismiss and attached a copy of the loan agreement signed by Robert Sharp. The loan document provides, above Mr. Sharp's signature, that debtor "acknowledges receipt of a completely filled in copy prior to execution thereof." This acknowledgment by Mr. Sharp created a rebuttable presumption that the required disclosures were made.[22] Mr. Sharp failed to rebut this presumption by filing an affidavit or otherwise pleading further. The dismissal of the TILA claim was therefore proper.[23] *See Whitlock v. Midwest Acceptance Corp.*, 76 F.R.D. 190 (E.D.Mo.1977).

[21] Ill.Rev.Stat., ch. 121½, § 562.3, defines this term:

> "Retail seller" or "seller" means a person engaged in the business of selling motor vehicles to retail buyers in retail installment transactions.

The bank is not in the business of selling motor vehicles. *See also* Ill.Rev.Stat., ch. 121½, §562.4:

> "Retail installment transaction" means a credit sale of a motor vehicle by a retail seller to a retail buyer for a deferred payment price payable in one or more installments.

[22] 15 U.S.C. § 1635(c) provides:

> Notwithstanding any rule of evidence, written acknowledgement of receipt of any disclosures required under this subchapter by a person to whom a statement is required to be given pursuant to this section does no more than create a rebuttable presumption of delivery thereof.

[23] Plaintiffs argue that the filing of an affidavit by Mary Sharp should be sufficient. However, both the purchase agreement and the loan documents are signed by Robert Sharp alone. The loan agreement provides a place for a second debtor or co-signer to sign, but this space is left blank. It appears that Mary Sharp did not obligate herself in any way to defendant and therefore would not be entitled to disclosure. Her affidavit adds nothing to Robert Sharp's claim.

In addition, if plaintiffs could have stated a claim under the Illinois Motor Vehicle Retail Installment Act, Mr. Sharp's acknowledgment would provide "conclusive proof" of delivery according to the terms of that statute.

VII

Plaintiffs' final claim is that the district court improperly dismissed the class action request in *Childs v. First National Bank of Peoria*, No. 77-2031.[24] In this case the complaint consisted of six counts, three of which were for class action relief and three of which were for individual relief. The district court dismissed the entire complaint, including the class action counts.

While the reasons for the dismissal of the class action counts by the district court are not clear from the record provided on appeal,[25] the district judge was not required to reach the issue since the individual substantive claims by plaintiff were dismissed.[26] In light of our holding in Part III that this plaintiff has stated a cause of action under TILA, we direct the district court, on remand, also to consider the class action allegations of the complaint in this case.

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[24] Plaintiffs also argue that this issue involves No. 78-1060. In light of our holding in Part II of this opinion that the substantive cause of action was properly dismissed, we need not reach the class action issue in that case. In addition, defendants seem to believe that No. 78-1059 is also involved (Defendants' Brief p. 62). Plaintiffs do not argue this issue in their briefs with regard to this case (Plaintiffs' Brief pps. 93-102; *but see* p. 9). In any case, because of our conclusions in Parts II and IV that the substantive claims in this case were properly dismissed, we need not reach the class action issue.

[25] Apparently the motion to dismiss was granted at an oral hearing on September 6, 1977. The transcript of that hearing has not been provided to this court.

[26] For example, the district court may have concluded that, since plaintiff's individual claims were meritless, plaintiff could not adequately represent the class for purposes of securing relief. Since the district court's reasons have not been presented to us, however, this is merely a surmise.

VIII

The disposition of the cases in this appeal is as follows: Nos. 77-2032, 77-2179, 77-2180, 78-1058 through 78-1069, and 78-1198 are affirmed; Nos. 77-2029, 77-2030 and 77-2031 are reversed and remanded for further proceedings consistent with this opinion.

AFFIRMED IN PART; REVERSED IN PART.

OPINION BY JUDGE SPRECHER
United States Court of Appeals
For the Seventh Circuit
Chicago, Illinois 60604

August 16, 1978

Before
HON. WALTER J. CUMMINGS, *Circuit Judge*
HON. ROBERT A. SPRECHER, *Circuit Judge*
HON. WILLIAM J. BAUER, *Circuit Judge*

	)	Appeals from the
	)	United States Dis-
	)	trict Court, for the
	)	Southern District
	)	of Illinois, Peoria
	)	Division.
	)	
Nos. 77-2029 through 77-2032, 78-1059 through 78-1069, 77-2179, 77-2180, 78-1058, and 78-1198	)	Nos. CV77-1053,
	)	CV77-1059,
	)	CV77-1072,
	)	CV77-1060,
DAVID J. BASHAM and LINDA C. BASHAM, et al.,	)	CV77-1080,
	)	CV77-1081,
Plaintiffs-Appellants,	)	CV77-1083,
	)	CV77-1088,
vs.	)	CV77-1089,
	)	CV77-1090,
FINANCE AMERICA CORPORATION, et al.,	)	CV77-1093,
	)	CV77-1102,
Defendants-Appellees.	)	CV77-1107,
	)	CV77-1116,
	)	CV77-1117,
	)	CV77-1087,
	)	CV77-1119,
	)	CV77-1120,
	)	CV77-1139,
	)	CV78-1007,

These causes came on to be heard on the transcript of the record from the United States District Court for the Southern District of Illinois, Peoria Division, and were argued by counsel.

On consideration whereof, it is ordered and adjudged by this court that the judgments of the said District Court in these causes appealed from be, and the same hereby, Affirmed as to cases Nos. 77-2032, 77-2179, 77-2180, 78-1058 through 78-1069, and 78-1198; and are Reversed and Remanded as to Nos. 77-2029, 77-2030, and 77-2031, all cases are with costs, in accordance with the opinion of this court filed this date.

United States Court of Appeals

For the Seventh Circuit
Chicago, Illinois 60604

October 24, 1978

Before

Hon. WALTER J. CUMMINGS, Circuit Judge
Hon. ROBERT A. SPRECHER, Circuit Judge
Hon. WILLIAM J. BAUER, Circuit Judge

GAREY R. CHILDS, on behalf of himself and all others similarly situated, Plaintiff-Appellant,	)	Appeal from the United States District Court for the Southern District of Illinois, Peoria Division.
No. 77-2031 vs.	)	
FIRST NATIONAL BANK OF PEORIA, Defendant-Appellee.	)	Civil No. 77-1072 Robert D. Morgan, *Judge.*

On consideration of the petition for rehearing and suggestion for rehearing *in banc* filed in the above-entitled cause by defendant-appellee, First National Bank of Peoria, no judge in active service has requested a vote thereon, and all of the judges on the original panel have voted to deny a rehearing. Accordingly,

IT IS ORDERED that the aforesaid petition for rehearing, and suggestion that said petition be reheard *in banc* be, and the same is hereby, DENIED.

United States District Court

For the Southern District of Illinois, Northern Division

(Abstract of Record)

CHILDS -VS- FIRST NATIONAL BANK OF PEORIA
77-1072

* * *

Sept 6 Parties present by counsel for hearing on pending motions. Hear. on Def. Motion to Dismiss. Ordered that Mot. to Dismiss is allowed and Complaint is dismissed. (Morgan J.)

Sept 6 CLOSED —JS 6

STATUTES AND REGULATIONS INVOLVED

15 U.S.C. § 1604
Sec. 105. Regulations

The Board shall prescribe regulations to carry out the purposes of this title. These regulations may contain such classifications, differentiations, or other provisions, and may provide for such adjustments and exceptions for any class of transactions, as in the judgment of the Board are necessary or proper to effectuate the purposes of this title, to prevent circumvention or evasion thereof, or to facilitate compliance therewith.

15 U.S.C. § 1639
Sec. 129. Consumer Loans Not Under Open End Credit Plans

(a) Any creditor making a consumer loan or otherwise extending consumer credit in a transaction which is neither a consumer credit sale nor under an open end consumer credit plan shall disclose each of the following items, to the extent applicable:

(1) The amount of credit of which the obligor will have the actual use, or which is or will be paid to him or for his account or to another person on his behalf.

(2) All charges, individually itemized, which are included in the amount of credit extended but which are not part of the finance charge.

(3) The total amount to be financed (the sum of the amounts referred to in paragraph (1) plus the amounts referred to in paragraph (2)).

(4) Except in the case of a loan secured by a first lien on a dwelling and made to finance the purchase of that dwelling, the amount of the finance charge.

(5) The finance charge expressed as an annual percentage rate except in the case of a finance charge

(A) which does not exceed $5 and is applicable to an extension of consumer credit not exceeding $75, or

(B) which does not exceed $7.50 and is applicable to an extension of consumer credit exceeding $75.

A creditor may not divide an extension of credit into two or more transactions to avoid the disclosure of an annual percentage rate pursuant to this paragraph.

(6) The number, amount, and the due dates or periods of payments scheduled to repay the indebtedness.

(7) The default, delinquency, or similar charges payable in the event of late payments.

(8) A description of any security interest held or to be retained or acquired by the creditor in connection with the extension of credit, and a clear identification of the property to which the security interest relates.

15 U.S.C. § 1640
Sec. 130. Civil Liability

(a) Except as otherwise provided in this section, any creditor who fails to comply with any requirement imposed under this chapter or chapter 4 or 5 of this title with respect to any person is liable to such person in an amount equal to the sum of—

(1) any actual damage sustained by such person as a result of the failure;

(2) (A)(i) in the case of an individual action twice the amount of any finance charge in connection with the transaction, or (ii) in the case of an individual action relating to a consumer lease under chapter 5 of this title, 25 per centum of the total amount of monthly payments under the lease, except that the liability under this subparagraph shall not be less than $100 nor greater than $1,000; or

(B) in the case of a class action, such amount as the court may allow, except that as to each member of the class no minimum recovery shall be applicable, and the total recovery in such action shall not be more than the lesser of $500,000 or 1 per centum of the net worth of the creditor; and

(3) in the case of any successful action to enforce the foregoing liability, the costs of the action, together with a reasonable attorney's fee as determined by the court.

In determining the amount of award in any class action, the court shall consider, among other relevant factors, the amount of any actual damages awarded, the frequency and persistence of failures of compliance by the creditor, the resources of the creditor, the number of persons adversely affected, and the extent to which the creditor's failure of compliance was intentional.

* * *

(e) Any action under this section may be brought in any United States district court, or in any other court of competent jurisdiction, within one year from the date of the occurrence of the violation.

(f) No provision of this section or section 112 imposing any liability shall apply to any act done or omitted in good faith in conformity with any rule, regulation, or interpretation thereof by the Board or in conformity with any interpretation or approval by an official or employee of the Federal Reserve System duly authorized by the Board to issue such interpretations or approvals under such procedures as the Board may prescribe therefor, notwithstanding that after such act or omission has occurred, such rule, regulation, interpretation, or approval is amended, rescinded, or determined by judicial or other authority to be invalid for any reason.

12 C.F.R. § 226.2
Definitions and Rules of Construction

* * *

(gg) "Security interest" and "security" mean any interest in property which secures payment or performance of an obligation. The terms include, but are not limited to, security interests under the Uniform Commercial Code, real property mortgages, deeds of trust, and other consensual or confessed liens whether or not recorded, mechanic's, materialmen's, artisan's, and other similar liens, vendor's liens in both real and personal property, the interest of a seller in a contract for the sale of real property, any lien on property arising by operation of law, and any interest in a lease when used to secure payment or performance of an obligation.

12 C.F.R. § 226.8
Credit Other Than Open End—Specific Disclosures

* * *

(b) In any transaction subject to this section, the following items, as applicable, shall be disclosed:

(1) The date on which the finance charge begins to accrue if different from the date of the transaction.

(2) The finance charge expressed as an annual percentage rate, using the term "annual percentage rate," except in the case of a finance charge

(i) Which does not exceed $5 and is applicable to an amount financed not exceeding $75, or

(ii) Which does not exceed $7.50 and is applicable to an amount financed exceeding $75.

A creditor may not divide an extension of credit into two or more transactions to avoid the disclosure of an annual percentage rate, nor may any other percentage rate be disclosed if none is stated in reliance upon subdivisions (i)

or (ii) of this subparagraph.

(3) The number, amount, and due dates or periods of payments scheduled to repay the indebtedness and, except in the case of a loan secured by a first lien or equivalent security interest on a dwelling made to finance the purchase of that dwelling and except in the case of a sale of a dwelling, the sum of such payments using the term, "total of payments."[10] If any payment is more than twice the amount of an otherwise regularly scheduled equal payment, the creditor shall identify the amount of such payment by the term "balloon payment" and shall state the conditions, if any, under which that payment may be refinanced if not paid when due.

(4) The amount, or method of computing the amount, of any default, delinquency, or similar charges payable in the event of late payments.

(5) A description or identification of the type of any security interest held or to be retained or acquired by the creditor in connection with the extension of credit, and a clear identification of the property to which the security interest relates or, if such property is not identifiable, an explanation of the manner in which the creditor retains or may acquire a security interest in such property which the creditor is unable to identify. In any such case where a clear identification of such property cannot properly be made on the disclosure statement due to the length of such identification, the note, other instrument evidencing the obligation, or separate disclosure statement shall contain reference to a separate pledge agreement, or a financing statement, mortgage, deed of trust, or similar document evidencing the security interest, a copy of which shall be furnished to

[10] The disclosures required by this sentence need not be made with respect to interim student loans made pursuant to Federally insured student loan programs under Public Law 89-329, Title IV Part B of the Higher Education Act of 1965, as amended.

the customer by the creditor as promptly as practicable. If after-acquired property will be subject to the security interest, or if other or future indebtedness is or may be secured by any such property, this fact shall be clearly set forth in conjunction with the description or identification of the type of security interest held, retained or acquired.

(6) A description of any penalty charge that may be imposed by the creditor or his assignee for prepayment of the principal of the obligation (such as a real estate mortgage) with an explanation of the method of computation of such penalty and the conditions under which it may be imposed.

(7) Identification of the method of computing any unearned portion of the finance charge in the event of prepayment in full of an obligation which includes precomputed finance charges and a statement of the amount or method of computation of any charge that may be deducted from the amount of any rebate of such unearned finance charge that will be credited to the obligation or refunded to the customer. If the credit contract does not provide for any rebate of unearned finance charges upon prepayment in full, this fact shall be disclosed.

(8) If the annual percentage rate as disclosed under § 226.8(b)(2) is prospectively subject to increase,[10a] the following additional disclosures shall be made:

(i) the fact that the annual percentage rate is subject to increase and the conditions under which such rate may increase, including: (A) identification of the index, if any, with respect to which such increase in annual percentage rate is tied; and (B) any limitation on such increase;

[10a] For this purpose, the phrase "prospectively subject to increase" does not apply to increases in the annual percentage rate upon such occurrences as default, acceleration, late payment, assumption or transfer of property.

(ii) the manner(s) (such as an increase in payment amounts, number of scheduled periodic payments, or in the amount due at maturity) in which any increase in the annual percentage rate may be effected;

(iii) if the obligation is repayable in substantially equal instalments at substantially equal intervals (including those obligations providing for "balloon" payments) and the increase could be effected by an increase in the periodic payment amount, a statement of the estimated increase in the amount of the payment caused by a hypothetical immedicate increase of one quarter of one percentage point, based upon the number of scheduled periodic payments and original amount financed disclosed at consummation;

(iv) if the obligation is repayable in substantially equal instalments at substantially equal intervals (including those obligations providing for "balloon" payments) and the increase could be effected by an increase in the number of periodic payments, a statement of the estimated increase in the number of periodic payments caused by a hypothetical immediate increase of one quarter of one percentage point, based upon the periodic payment amount and the original amount financed disclosed at consummation.

Any increase in the annual percentage rate within the conditions or limitations disclosed in accordance with this paragraph is a subsequent occurrence under § 226.6(g) and is not a refinancing under § 226.8(j).

The disclosures required under § 226.8(b)(8)(iii) and (iv) need be made only in transactions in which a security interest is taken in real property used or expected to be used as the customer's dwelling, and they need not be made in transactions primarily for agricultural purposes, transactions in which the obligation is repayable in substantially equal instalments which do not include repayments of principal, or transactions in which disclosures are made pursuant to § 226.814.

* * *

(d) In the case of a loan or extension of credit which is not a credit sale, in addition to the items required to be disclosed under paragraph (b) of this section, the following items, as applicable, shall be disclosed:

(1) The amount of credit, excluding items set forth in paragraph (e) of this section, which will be paid to the customer or for his account or to another person on his behalf, including all charges, individually itemized, which are included in the amount of credit extended but which are not part of the finance charge, using the term "amount financed."

(2) Any amount referred to in paragraph (e) of this section required to be excluded from the amount in subparagraph (1) of this paragraph, using, as applicable, the terms "prepaid finance charge" and "required deposit balance," and, if both are applicable, the total of such items using the term, "total prepaid finance charge and required deposit balance."

(3) Except in the case of a loan secured by a first lien or equivalent security interest on a dwelling and made to finance the purchase of that dwelling, the total amount of the finance charge,[11] using the term "finance charge," and where the total charge consists of two or more types of charges, a description of the amount of each type.

12 C.F.R. § 226.202

SECTION 226.202—SECURITY INTEREST—CONFESSIONS OF JUDGMENT—COGNOVIT NOTES

Under § 226.2(gg) "security interest" is defined to

[11] The disclosure required by this subparagraph need not be made with respect to interim student loans made pursuant to Federally insured student loan programs under Public Law 89-329, Title IV Part B of the Higher Education Act of 1965, as amended.

include confessed liens whether or not recorded and, in general, to include any interest in property which secures payment or performance of an obligation. In certain transactions involving a security interest, under § 226.9 the customer has a right of rescission.

In some of the States, confession of judgment clauses or cognovit provisions are lawful and make it possible for the holder of an obligation containing such clause or provision to record a lien on property of the obligor simply by recordation entry of judgment; the obligor is afforded no opportunity to enter a defense against such action prior to entry of the judgment.

Since confession of judgment clauses and cognovit provisions in such States have the effect of depriving the obligor of the right to be notified of a pending action and to enter a defense in a judicial proceeding *before* judgment may be entered or recorded against him, such clauses and provisions in those States are security interests under § 226.2(gg) and for the purposes of § 226.7(a)(7), §226.8(b)(5), and § 226.9. This is the case even if the judgment cannot be entered until after a default by the obligor.

Confession of judgment clauses and cognovit provisions which, by their terms, exclude a lien on all real property which is used or is expected to be used as the principal residence of the customer, would not bring a transaction under the provisions of § 226.9

Ill. Rev. Stat. ch. 26, § 9-204
After-acquired property; Future advances

* * *

(2) No security interest attaches under an after-acquired property clause to consumer goods other than accessions (Section 9-314) when given as additional security unless the debtor acquires rights in them within 10 days after the secured party gives value.

Ill. Rev. Stat. ch. 77, §9
When execution binds personality—Noting receipt of

No execution shall bind the goods and chattels of the person against whom it is issued, until it is delivered to the sheriff or other proper officer to be executed; and for the better manifestation of the time, the sheriff or other officer shall, on receipt of such writ, indorse upon the back thereof the day of the month and year and hour when he received the same.

Ill. Rev. Stat. ch. 77, § 10
What liable to execution

All and singular the lands, tenements, his real estate, goods and chattels (except such as is by law declared to be exempt) of every person against whom any judgment has been or shall be hereafter obtained in any court, for any debt, damages, costs, or other sum of money, shall be liable to be sold upon execution, to be issued upon such judgment.

Ill. Rev. Stat. ch. 110, § 50
Judgments—Default—Confession

* * *

(3) Any person for a debt bona fide due may confess judgment by himself or attorney duly authorized, without process. The application to confess judgment shall be made in the county in which the note or obligation was executed or in the county in which one or more of the defendants reside or in any county in which is located any property, real or personal, owned by any one or more of the defendants. A judgment entered by any court in any county other than those herein specified has no force or validity, anything in the power to confess to the contrary notwithstanding.

DISCLOSURE STATEMENT OF LOAN

BORROWERS (NAMES AND ADDRESSES): LENDER: LOAN NO._____ Date_____

_____

_____ (STREET ADDRESS)

_____ (CITY) (STATE) (ZIP)

TOTAL OF PAYMENTS	FINANCE CHARGE	AMOUNT FINANCED	ANNUAL PERCENTAGE RATE:	CREDIT LIFE INSURANCE CHARGE	DISABILITY INSURANCE CHARGE	PROPERTY INSURANCE CHARGE
$	$	$	%	$	$	$

PAYABLE IN: CONSECUTIVE MONTHLY INSTALLMENTS	DUE DATE OF PAYMENTS			AMOUNT OF PAYMENTS			
	FIRST:	OTHERS: SAME DAY OF EACH MONTH	FINAL:	FIRST:	OTHERS:	FINAL:	RECORDING FEE
				$	$	$	$

INSURANCE

PROPERTY INSURANCE, if written in connection with this loan, may be obtained by borrower through any person of his choice. If borrower desires property insurance to be obtained through the creditor, the cost will be $_____ for the term of the credit.

CREDIT LIFE AND DISABILITY INSURANCE is not required to obtain this loan. No charge is made for credit insurance and no credit insurance is provided unless the borrower signs the appropriate statement below:

(a) The cost for Credit Life Insurance alone will be $_____ for the term of the credit.

(b) The cost for Credit Life and Disability Insurance will be $_____ for the term of the credit.

I desire Credit Life and Disability Insurance.		I desire Credit Life Insurance only.		I DO NOT want Credit Life or Disability Insurance.	
(Date)	(Signature)	(Date)	(Signature)	(Date)	(Signature)

REBATE FOR PREPAYMENT IN FULL. If the loan contract is prepaid in full by cash, a new loan, refinancing or otherwise before the final installment date, the borrower shall receive a rebate of precomputed interest computed under the Rule of 78's.

DEFAULT CHARGE. [The creditor should set forth the amount, or method of computing the amount, of any default, delinquency, or similar charges payable in the event of late payments.]

SECURITY

DESCRIPTION

A. ☐ This Loan is Secured By a Security Agreement of Even Date covering.....

☐ Motor Vehicle(s): Make- ..... Serial No: .....

☐ Household Goods & Appliances of the following description:.....

.....

.....

.....

☐ Other: (Describe) .....

The Security Agreement will secure future or other indebtedness and will cover after-acquired property.

B. ☐ This Loan is Unsecured.

I ACKNOWLEDGE RECEIPT OF A COPY OF THIS STATEMENT.

Borrower: .....

Witness: .....

This form, when properly completed, will show how a creditor may comply with the disclosure requirements of the provisions of paragraphs (b) and (d) of § 226.8 of Regulation Z for the type of credit extended in this example. This form is intended solely for purposes of demonstration and it is not the only format which will permit a creditor to comply with disclosure requirements of Regulation Z.

ILLUSTRATION OF FEDERAL DISCLOSURES ON A SEPARATE STATEMENT FOR A LOAN REPAYABLE IN INSTALLMENTS

(Section 226.8)

Regulation Z

Applicable Disclosures Shown on Exhibit E (opposite page)	Reference (226.8)
1. Identification of Transaction	(a)
2. "Amount Financed" including itemized charges other than finance charges. (Note § 226.4(b))	(d)(1)
3. "Finance Charge"	(d)(3)
4. "Annual Percentage Rate"	(b)(2)
5. Number, Amount, and Due Date of Payments	(b)(3)
6. "Total of Payments"	(b)(3)
7. Default, Delinquency, or Similar Charge	(b)(4)
8. Identification of Security Interest	(b)(5)
9. Identification of Property to Which Security Interest Relates	(b)(5)
10. Method of Computing Any Unearned Portion of the Finance Charge	(b)(7)
11. After-acquired Property Subject to Security Interest	(b)(5)
12. Security for Future Indebtedness	(b)(5)
13. Identification of Creditor	(a)
14. Credit Life, Accident, and Health Insurance	§ 226.4(a)(5)
15. Property and Liability Insurance	§ 226.4(a)(6)

Other Disclosures Not Applicable to Example Shown in Exhibit E

Regulation Z prescribes other disclosures to be made in connection with loan credit which are not applicable to the illustrated example, such as, prepaid finance charge (d)(2) required deposit balance (d)(2) and balloon payment (b)(3), etc.

NOTE AND SECURITY AGREEMENT

5325.64
AMOUNT OF LOAN

1-19-77.
DATE

DEBTOR

GAREY R. CHILDS 710 N. MAIN
Name Address

ABINGDON ILL. 61410 462-3626 368-58-2854
City State Zip Phone Social Security Number

FOR VALUE RECEIVED, I and we the undersigned, jointly and severally promise to pay to the order of **The First National Bank of Peoria,** 416 Main Street, Peoria, Illinois 61601 the sum of $ 5325.64 in 47 successive monthly instalments of $ 124.42 each and a final instalment, which shall be $ 124.42 beginning on February 15TH, 19 77 and thereafter on the same day of each subsequent month until paid in full. Unequal or irregular payment may be displayed below.

DETAILS OF UNEQUAL OR IRREGULAR PAYMENTS	AMT.: DUE ON (Mo.-Day-Yr.):	AMT.: DUE ON (Mo.-Day-Yr.):	AMT.: DUE ON (Mo.-Day-Yr.):	AMT.: DUE ON (Mo.-Day-Yr.):
	AMT.: DUE ON (Mo.-Day-Yr.):	AMT.: DUE ON (Mo.-Day-Yr.):	AMT.: DUE ON (Mo.-Day-Yr.):	AMT.: DUE ON (Mo.-Day-Yr.):

1. Debtor(s) agrees that the Collateral described herein shall be kept at the following address if different than above:

2. **CONFESSION OF JUDGMENT;** The undersigned, and each of them, hereby authorize irrevocably any attorney of any court of record to appear for any one or more of them, in such court, in term or vacation, after any default hereon and confess a judgment without process in favor of the Holder hereof for such amount as may appear unpaid hereon, together with cost of suit and reasonable attorneys' fees and to release and waive all errors that may intervene and consent to immediate execution thereon. Notwithstanding any provision hereof or of applicable law, Holder irrevocably waives all rights to make a judgment confessed herein a lien on any real property which is used or expected to be used as the principal residence of the undersigned Debtor:(s), in which the undersigned Debtor(s) may now or hereafter have an interest. A security interest in the personal property and real property other than principal residence of Debtor(s) is created by the Confession of Judgment clause herein.

Description or identification of the type of the security interest to be retained: ☒ Motor Vehicle ☐ Boat ☐ Mobile Home ☐ Appliances ☐ Farm Equipment ☐ OTHER

New or Used	Year and Make	Series	Body Style	No. Cyl.	Truck Ton Capacity	Manufacturer's Serial Number	Ignition Key Number	Color	Proposed Use
N	77 GMC	G1500	1/2 T. P.U.	8		TGU15745D3962		BLUE	☒ Personal ☐ Business ☐ Agriculture

☒ Automatic Trans. ☐ 4 Speed ☒ Power Steering ☒ Power Brakes ☐ Power Windows ☐ Power Seat ☒ Air Conditioner ☒ Radio ☒ Stereo ☒ Bucket Seats ☐ Fuel Injection ☐ _____

DESCRIPTION WHEN COLLATERAL IS OTHER GOODS:

INSURANCE AGREEMENT — GROUP CREDIT INSURANCE

Credit Insurance is not required by Bank to obtain this loan. No credit insurance is to be provided unless the Debtor signs the authorization below. Group Credit Insurance is available for the term of the credit at the following costs:

Credit Life Insurance $ 91.45

Credit Disability Insurance $ 138.48

NON-GROUP INSURANCE

Property insurance may be required by Bank. Debtor may obtain insurance through insurer of his choice so long as insurer is qualified to provide insurance under the provisions of the "Illinois Insurance Code" and all requirements of the Director of Insurance related thereto. If Debtor desires to borrow the premium, the cost is as follows:

$ _____ for the term of _____ months.

Single Premium Disability Income Insurance may be available from Debtor's own insurance agent. This is an individual policy and not a Group policy, and is not required by the lender to obtain this loan. If Debtor desires to borrow the premium, the cost is as follows:

$ _____ for the term of _____ months.

I desire the above insurance where premium amount is indicated

1-19-77 x Garey R. Childs
(DATE) Insured Debtor's Signature

STATEMENT OF TRANSACTION

1. Proceeds	$ 4318.20
2. Credit Life Insurance	$ 91.45
3. Credit Disability Insurance	$ 138.48
4. Property Insurance	$ _____
5. Single Premium Disability Income Insurance	$ _____
6. Other Charges	
Filing Fees/Non-Filing Ins.	$ _____
_____	$ _____
7. Amount Financed (Sum of 1, 2, 3, 4, 5 and 6)	$ 4447.93
8. **FINANCE CHARGE**	$ 877.71
Consisting of the following (Itemize):	
Interest $ _____	
Service Charge $ _____	
9. Total of Payments (Sum of 7 & 8)	$ 5325.64
10. **ANNUAL PERCENTAGE RATE**	9.28 %

SECURITY INTEREST: This loan is secured by a security interest created under this Security Agreement in the property described above which security interest may attach to any additions or accessions thereto. In addition to the foregoing security the Holder has a security interest for the payment of all obligations due it in all property and assets of Debtor(s) which are in the possession or control of Holder and a right of set-off or lien on any deposit or sums now or hereafter owed by Holder to Debtor(s). This Security Agreement will secure future or other indebtedness and will cover after acquired property. A security interest in the personal property and real property other than principal residence of Debtor is created by the Confession of Judgment Clause herein.

DEFAULT CHARGES: The undersigned further agree to promptly pay to the legal Holder hereof a delinquency charge on each principal instalment unpaid for a period of ten **(10)** days past its due date, equal to five persent **(5%)** of the instalment or five dollars **($5.00),** whichever is less. Debtor(s) is obligated to pay reasonable attorney's fees incurred by Holder in the collection or enforcement of debt. In the event of any default hereunder, (as detailed on reverse side hereof) the entire balance may be declared due and payable.

RIGHT OF PREPAYMENT: The Debtor(s) may satisfy in full at any time before maturity the debt evidenced by this document and in so satisfying shall receive a refund credit against the amount of the total **FINANCE CHARGE** (Item 8 above) added to the principal in an amount at least as great a portion of the total **FINANCE CHARGE** as the sum of the periodical time balances after the date of payment bears to the sum of all the periodical time balances under the schedule of payments provided for in this instrument, except that when the amount of the refund credit so computed is less than **$1.00** no refund credit need be made. This statutory computation employs the "sum of the digits" method, also known as the **"RULE OF 78THS".** Any partial prepayments accepted by the Holder hereof will be applied to the last instalment due hereunder and there shall be no reduction of the **FINANCE CHARGE.** Prepayment in full will reduce the Group Credit Insurance charge (if any) for this loan, however the Property Insurance policy and/or the Single Premium Disability Income Insurance policy must be returned directly to the insurance company for any possible refund of premium.

FINANCE CHARGE: The **FINANCE CHARGE** shall begin to accrue on the date that the loan evidenced hereby is disbursed by the Lender.

NOTICE: See other side for important information. (Additional Terms and Provisions continued on reverse side.)

THIS NOTE AND SECURITY AGREEMENT IS SUBJECT TO ALL OF THE TERMS AND CONDITIONS SET FORTH ON THE REVERSE SIDE. BY EXECUTING THIS INSTRUMENT, DEBTOR(S) AGREES TO ALL ITS TERMS AND CONDITIONS AND ALSO ACKNOWLEDGES THE RECEIPT OF A COMPLETELY FILLED IN COPY PRIOR TO EXECUTION HEREOF. CO-SIGNER(S) IF ANY, ACKNOWLEDGES RECEIPT OF COMPLETED COPIES OF THIS NOTE AND SECURITY AGREEMENT.

DEBTOR X Garey R. Childs DEBTOR X _____

327A

A-44 - A-45

Supreme Court, U. S.
FILED
JUN 25 1979
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-1468

FIRST NATIONAL BANK OF PEORIA,
Petitioner,

vs.

GAREY R. CHILDS, On Behalf of Himself and All Others Similarly Situated,
Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

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June 19, 1979

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-1468

FIRST NATIONAL BANK OF PEORIA,
Petitioner,

vs.

GAREY R. CHILDS, On Behalf of Himself and All Others Similarly Situated,
Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

To the Honorable, the Chief Justice and Associate Justices of the Supreme Court of the United States:

Garey R. Childs, on behalf of himself and all others similarly situated ("consumer"), respondent, respectfully submits this brief in opposition to a petition for Writ of Certiorari filed by petition First National Bank of Peoria ("bank") to review the judgment of the United States Court of Appeals for the Seventh Circuit, entered on August 16, 1978, rehearing denied, October 24, 1978, reversing the judgment of the United States District Court for the Southern District of Illinois, entered September 6, 1977. The case below is one of nineteen consolidated Truth in Lending actions and was entitled *Basham* v. *Finance America Corp.*, 583 F. 2d 918 (7th Circuit, 1978).

I. OPINIONS OF THE COURTS BELOW

Consumer accepts the bank's statement of the lower court opinions.

II. JURISDICTIONAL STATEMENT

Consumer accepts the statement of jurisdiction offered by bank.

III. STATUTES AND REGULATIONS INVOLVED

Consumer accepts the bank's statement of statutes and regulations involved to the extent that they deal with the "dragnet" or over-broad security interest issue. As noted below, references to Illinois' Confession of Judgment Act are irrelevant.

IV. QUESTIONS PRESENTED FOR REVIEW

1. Whether the bank's over-broad (and therefore unlawful) claim to consumer's after-acquired consumer goods (in violation of § 9-204(2) of the Illinois Uniform Commercial Code) violated the Truth in Lending Act and Regulation Z.
2. Whether the bank could, in good faith, rely on a pamphlet published by the Federal Reserve Board in 1969 ("What You Should Know About Truth In Lending") which was later substantially repudiated by the Federal Reserve Board itself.

The bank's reference to issues involving its confession of judgment clause is factually incorrect; the Childs contract was not in default when this suit was filed and the bank never confessed a judgment against Childs. The confession of judgment issue was never raised below and played no part in either the decision of the District Court or of the Seventh Circuit.

V. STATEMENT OF THE CASE

On July 25, 1977, Garey R. Childs filed a class action complaint against First National Bank of Peoria in the United States District Court for the Southern District of Illinois. He alleged that jurisdiction was conferred by the Truth in Lending Act, 15 U. S. C. § 1640(e). He said that the class was composed of himself and all others who had borrowed funds from the bank during the year immediately preceding the filing of his complaint; provided that the borrowers executed a note and security agreement within the State of Illinois on a form identical to the one executed by him, and that the form contained a security agreement granting to the bank a security interest in consumer goods other than accessions acquired more than 10 days after the bank made the loan. Childs sought certification of the class under Rules 23(a) and 23(b)(3) of Federal Rules of Civil Procedure, alleging that he was a proper representative of the class and that his claims were typical of all other members of it.

In January, 1977, Childs bought a new 1977 GMC van for his personal use and financed it at First National Bank in Peoria. He signed the bank's standard motor vehicle installment contract which on its face and above the place for consumer's signature provided:

> This loan is secured by a security interest created under this Security Agreement in the property described above which security interest may attach to any additions or accessions thereto. In addition to the foregoing security the Holder has a security interest for the payment of all obligations due it in all property and assets of Debtor(s) which are in the possession or control of Holder and a right of set-off or lien on any deposit or sums now or hereafter owed by Holder to Debtor(s). This Security Agreement will secure future or other indebtedness and will cover after-acquired property.

On the document's reverse an additional security agreement appears which reads:

> Debtor(s) agrees that Holder shall have, and there is hereby created in favor of Holder a security interest in the Collateral described herein (including all accessories, parts and equipment now or hereafter at any time installed in or affixed thereto or used in connection therewith) . . .

Section 9-204(2) of the Uniform Commercial Code, Illinois Revised Statutes, 1975, Chapter 26, ¶ 9-204(2), reads as follows:

> No security interest attaches under an after-acquired property clause to consumer goods other than accessions (§ 9-314) when given as additional security unless the debtor acquires rights in them within 10 days after the secured party gives value.

The credit extended by the bank to Childs was a consumer loan not under an open end credit plan (a so-called "closed end" loan). The specific issue in this case is whether the loan made to Childs violated 15 U. S. C. § 1639(a)(8) and Regulation Z, § 226.8(b)(5).

15 U. S. C. § 1639(a)(8) reads in pertinent part as follows:

> Any creditor making a consumer loan . . . shall disclose . . .:
>
> 8. A description of any security interest held or to be retained or acquired by the creditor in connection with the extension of credit, and a clear identification of the property to which the security interest relates.

Regulation Z, § 226.8(b)(5) requires the creditor to disclose:

> A description or identification of the type of any security interest held or to be retained or acquired by the creditor in connection with the extension of credit, and a clear identification of the property to which the security interest relates . . . If after-acquired property will be subject to the security interest, or if other or future indebtedness is or may be secured by any such property, this fact shall be clearly set forth in conjunction with the description or identification of the type of security interest held, retained or acquired.

Finally, Regulation Z, § 226.8(a)(1) requires all disclosures to be made on the note or other instrument evidencing the obligation on the same side of the page and above or adjacent to the place for the customer's signature ("the single document rule").

Briefly stated, the bank, on page one of its contract disclosed that it had a security interest in any additions or accessions, and that the security agreement would cover after-acquired property. The claim of security in "accessions" is clearly lawful under Illinois and federal law; the claim of security in "additions" is not. The bank's broad assertion that the security interest "will cover after-acquired property" violates Illinois and federal law.

On the reverse of the bank's contract (in violation of the single document rule), the bank claimed a security interest in all accessories, parts and equipment now or hereafter at any time installed in, or affixed to the vehicle, or used in connection with it. Thus, the bank's disclosures on the face of the contract misled the consumer, because what was disclosed on page one was different than the security claimed on the reverse.

VI. REASONS FOR GRANTING THE WRIT

The bank's overbroad claim to the consumer's after-acquired consumer goods clearly violates U. C. C. § 9-204(2). That section of the Uniform Commercial Code, in force in Illinois since 1962 (and which is the law of 48 other states as well), contains a specific prohibition against broad claims to after-acquired property in a consumer's hands. 15 U. S. C. § 1639 (a)(8) and Regulation Z, § 226.8(b)(5) both require a creditor to make truthful disclosures, neither understating nor overstating the extent of the collateral claimed.

What the bank did in this case was to:

1. Make an overbroad claim to after-acquired property in violation of Illinois law.
2. Disclose a portion of the claimed security on the face of the contract and then add another and separate claim on the reverse to additional securitiy (all accessories, parts and equipment now or hereafter at any time

installed in or affixed to the vehicle, or used in connection with it).

3. Violate the single document rule of Regulation Z, § 226.8(a)(1).

This case presents no new or novel issues of federal or state law. The after-acquired property issue and its interplay with the Truth in Lending Act has been litigated many times: *Basham* v. *Finance-America Corp.*, 583 F. 2d 918 (7th Circuit, 1978); *Tinsman* v. *Moline Beneficial Finance Company*, 531 F. 2d 815 (7th Circuit, 1976); *Murphy* v. *Beneficial Finance Company*, 443 F. Supp. 463 (S. D. Ohio, 1976); *Pollock* v. *General Finance Corp.*, 535 F. 2d 295 (5th Circuit, 1976), reheard and affirmed 552 F. 2d 1142 (5th Circuit, 1977), cert. den., 434 U. S. 891 (1977); *Jacklitch* v. *Redstone Federal Credit Union*, 463 F. Supp. 1124 (N. D. Alabama, 1979).

Gennuso v. *Commercial Bank and Trust Company*, 566 F. 2d 437 (3rd Circuit, 1977), holds that all Truth in Lending disclosures must be made on the same side of the document and is the leading exposition of the single document rule. The bank's disclosures are on both sides of the document, and its claims to collateral are on the reverse are far more comprehensive than those on page one.

Ambiguities in disclosure statements or unclear disclosures are to be resolved against the lender. *Sneed* v. *Beneficial Finance Company of Hawaii*, 410 F. Supp. 1135 (Dist. Hawaii, 1976). In *Starks* v. *Orleans Motors, Inc.*, 372 F. Supp. 928, 932 (E. D. La., 1974) affirmed mem., 500 F. 2d 1182 (5th Circuit, 1974) the court said:

> Where the nature of an act is remedial as here, it should be construed liberally in an attempt to provide the remedy, not to avoid it.

Finally, the bank argues that it "relied" on the Federal Reserve Board's pamphlet "What You Ought to Know About Truth in Lending". Three comments are appropriate. First, the bank initially raised this issue on appeal, not in the trial court

and the Seventh Circuit rejected the argument. Second, Federal Reserve Board Letter 983, December 30, 1975 (CCH Consumer Credit Guide, ¶ 31,323) provides:

> It must be emphasized, however, that staff's position on this issue rests not on Exhibit E of the pamphlet but on Regulation Z itself. As indicated in Letter 829, we do not believe that a creditor can automatically comply with the Regulation by using a sample form, regardless of whether the terms of the creditor's own credit plan coincide with those described in that form. For example, if a creditor discloses that the Rule of 78's will be used to compute finance charge rebates and State law does not permit the use of that rebate method in that type of credit transaction, this disclosure would clearly violate § 226.8(b)(7), despite the fact that the creditor's disclosure exactly mirrors the language of Exhibit E.

Third, the pamphlets was issued by the Federal Reserve Board in 1969. This case was filed in 1977. The plethora of after-acquired property cases which were decided in the intervening period should have been ample notice to the bank that claimed reliance on the Board's early pronouncement was misplaced.

VII. CONCLUSION

The Seventh Circuit's decision is correct. The bank violated Illinois law, the Truth in Lending Act and Regulation Z in a number of important ways. Its contract clearly misled the consumer. There are no novel issues to be decided by this court, and for these reasons the bank's petition for a writ of certiorari should be denied.

Respectfully submitted,

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